2005

The New Prosecution

Kay L. Levine

THE NEW PROSECUTION

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I think if you were to ask most prosecutors what their goals are, they would say: "My job is to put bad guys away." That goal is endorsed by our education and by our culture which ratifies the case as the most important unit of success. . . . That unit of success, I think, turns us into technicians, because that means that we simply process cases. If you were to change the goal slightly . . . that completely changes both the methods that you use, the partners you choose, and every single aspect of what you do.[1]

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1. John Feinblatt & Derek Denckla, *What Does It Mean To Be a Good Lawyer?: Prosecutors, Defenders and Problem-Solving Courts*, 84 JUDICATURE 206, 209 (2001) (quoting Elizabeth Glazer).

I. INTRODUCTION

During the past half century, the prosecutor has emerged as the empire builder of the American criminal justice system. Taking advantage of legislative efforts to limit judicial discretion, the prosecutor's office has siphoned revenue, power, and control from the bench and has become the principal actor responsible for determining case outcomes and sentences for criminal defendants.

Recent evidence suggests that the imperial role of the prosecutor has reached new heights in the past decade. Supplementing their vast ability to control case outcomes through filing and plea bargain practices, some prosecutors now hold the authority and resources to combat social problems that tangentially relate to criminal behavior. In the new prosecution system, prosecutors are more than just advocates in an adversary system; they are social engineers.

This Article presents evidence of the new model of prosecution emerging in American society. It examines empirical data from California's Statutory Rape Vertical Prosecution Program ("SRVPP"), a wide-ranging prosecution effort directed at ameliorating a slate of problems caused by adolescent sexuality. In addition to broadening our conventional understanding of the county prosecutor's role in the adversary system, the results of my investigation provide an empirical perspective on the success or failure of the new prosecution approach and question the use of problem-oriented methods by criminal justice agencies in the United States.

Problem-oriented approaches challenge law enforcement personnel to abandon their traditional reactive orientations in favor of proactive efforts to solve social problems that underlie low-level criminal behavior.[2] The problem-oriented, or problem-solving, model first appeared in the police literature as officers were urged to develop extensive community networks to identify effective means for handling categories of troublesome situations, rather than focusing only on solving crimes and arresting criminals. Since its emergence in the policing context, the community-based, problem-centered orientation has also been manifest in therapeutic courts[3] and in some local legal aid services,[4] both of which attempt to address the problems faced by (and caused by) criminal defendants in a more holistic fashion.

In the pages that follow, I use empirical data[5] to examine the benefits and implications of the problem-oriented approach for the institution of prosecution, which I argue has led to a new model of prosecution. Given their near total control over the decision of when and what to charge in a potential criminal case, prosecutors have

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2. Community policing targets crimes associated with quality-of-life issues in neighborhoods. These crimes commonly include low-level drug use or dealing, parking and traffic violations, disorderly group conduct, auto theft, vandalism, and peddlers. *See, e.g.*, JEROME E. MCELROY ET AL., COMMUNITY POLICING: THE CPOP IN NEW YORK 54-55 (1993). For other works addressing problem-solving strategies in the policing context, see *infra* notes 49-60 and accompanying text.

3. *See, e.g.*, Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1503-04 (2003); *see also infra* notes 63-69 and accompanying text.

4. *See, e.g.*, Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 124 (2004).

5. In the spring of 2001, I conducted a mail survey of all statutory rape prosecutors in California. Survey booklets were mailed to the designated SRVPP prosecutor in each of California's fifty-eight counties. I received completed surveys from forty-six counties (eighty percent response rate), and I analyzed the results using SPSS, a quantitative research software program. I followed this round of surveys with in-person interviews at thirty district attorneys' offices across the State. The interviews were tape-recorded, transcribed, and analyzed for content themes using NUD*IST, a qualitative-research software program. Counties throughout this Article are referenced using pseudonyms to protect the identities of my research subjects. Due to confidentiality constraints, the author assumes responsibility for the accuracy of reporting from all interviews referenced in this piece. For more information about my research methods, see Kay Leslie Levine, Prosecution, Politics and Pregnancy: Enforcing Statutory Rape in California 38-60 (Fall 2003) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with University of California, Berkeley Library).

long been recognized as among the most powerful actors in the criminal court. With plea bargaining largely replacing post-trial conviction and sentencing as the means by which the criminal justice system takes jurisdiction over the lives of offenders, the reach of prosecutorial power to dictate the outcome of cases has captured much scholarly attention for the past fifty years.[6] But alongside the vast literature about prosecutorial discretion, one can identify a fledgling but growing interest in alternative approaches to the usual way of doing business in the prosecutor's office.[7] How and why prosecutors behave as they do has come under scrutiny, as scholars and policymakers have subjected prosecutorial practices to rigorous analysis[8] and have offered new ways for prosecutors to meet a growing list of demands on their time and expertise. The proper scope and content of the prosecutorial role has thus become a matter for some debate in both the academy and among practitioners.

Recasting the prosecutor as problem-solver is one approach to this field of inquiry, although it has received little scholarly attention thus far. In the past decade, a handful of prosecutorial programs for drug interdiction and rehabilitation have adopted a modified problem orientation, and some localities have established community prosecution offices to keep local prosecutors in better touch with the needs of their respective communities.[9] By implementing these new structures and techniques, policymakers

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6. *See, e.g.*, William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004); *see also infra* note 42.

7. *See, e.g.*, Ronald Goldstock, *The Prosecutor as Problem-Solver*, 7 CRIM. JUST. 3 (1992); Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 489 (1996); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

8. *See, e.g.*, VERA INST. OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS (1981); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 251-52 (1980); Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 535 (1997).

9. *See* Catherine M. Coles & George L. Kelling, *Prevention Through Community Prosecution*, 136 PUB. INT. 69, 72-74 (1999); Catherine M. Coles & George L. Kelling, *Prosecution in the Community: A Study of Emergent Strategies* 34-37 (Program in Criminal Justice Policy and Management of the Malcolm Wiener Center for Social Policy, John F. Kennedy School of Government, Harvard University, 1998), *available at* http://www.ksg.harvard.edu/criminaljustice/publications/cross-site.pdf [hereinafter Coles & Kelling, *Emergent Strategies*]; Brian Forst, *Prosecutors Discover the Community*, 84 JUDICATURE 135 (2000).

and district attorneys seek to encourage local prosecutors to expand their professional objectives beyond conviction and sentencing of defendants and to prioritize the reduction of crime as a principal goal.[10] This model I term "the new prosecution."

My research indicates that California has advanced the new prosecution well beyond the "community prosecution work" or crime reduction strategies identified by other scholars.[11] California's SRVPP, formed in 1995 as one component of a media campaign to reduce pregnancy and welfare dependency among teenagers, requires California's prosecutors to concern themselves with purported social pathologies that bear only a marginal relationship to crime prevention and reduction. Prosecutors are expected not merely to enforce statutory rape cases and to witness the benefits from afar; they also counsel victims and their families and conduct outreach in schools, at county fairs, and with health professionals to bring the issue of teenage pregnancy and sexual abstinence to the forefront of the public agenda. They are armed with pencils warning "Sex Can Wait!" as well as with posters and videotapes warning against inappropriate relationships and the consequences of early childbearing. The SRVPP prosecutor is a new hybrid of advocate, bureaucrat, social worker, and politician.

Yet the empirical data I have collected cast doubt on the optimism that pervades the problem-solving literature and suggest that the institution of prosecution may be highly resistant to the revolution that the new prosecution's problem-solving approach requires. Many prosecutors are frustrated by the requirements of the hybrid role. They deplore the use of scarce prosecutorial resources for chronic, low-level offenses (like statutory rape). They complain that they are not trained for this type of work (they went to law school, not psychology school, we are reminded), and they resent its intrusion on what they regard as important prosecutorial work. Moreover, many prosecutors lament that neither their colleagues nor their adversaries in the criminal justice system respect social work, and having to do it makes one feel like less of a real prosecutor.

I argue that this dilemma reveals a deep-seated, gender-based tension in the institution of prosecution: valued prosecutorial skills (such as advocacy) have a masculine character, while under-appreciated work (such as counseling and outreach) is cast as

10. *See, e.g.*, Feinblatt & Denckla, *supra* note 1, at 209; Goldstock, *supra* note 7, at 4-7.

11. *See, e.g.*, Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 34-37; Forst, *supra* note 9.

feminine. In other words, for a prosecutor to gain respect from her peers and supervisors, she must emphasize her masculine skill set by going to court, by arguing with judges and defense attorneys, and by convincing juries beyond a reasonable doubt of the rightness of the state's case. Because in the new prosecution model (as embodied in the statutory rape assignment) a prosecutor must prioritize more feminine skills, devoting time and effort to victims, their families, and the community, she has little opportunity to earn traditional accolades, and her masculine skill set may (be perceived to) atrophy. The gendered institutional norms of the office instruct that one cannot simultaneously distribute propaganda and lollipops in high schools and be a tour de force in the courtroom. In short, the SRVPP evidence indicates that the institutional norms of the prosecutor's office, which prioritize and reward adversarial work on challenging, important crimes, discourage many prosecutors from understanding or supporting the type of revolutionary change embedded in the new prosecution's problem-oriented approach.[12]

These institutional constraints are weighty but need not be permanent. By reformulating its hiring and promotion policies, the prosecutor's office can inspire its employees to think more broadly about implementing crime-reduction strategies and about embedding criminal justice actors in a larger system of community networks. Yet while I support the limited problem-solving model that conceives of prosecutors as members of a community service agency devoted to crime reduction, I do not advocate the wide-ranging problem orientation that seems to lie at the heart of California's SRVPP. Turning prosecutors into social engineers gives them the ability to shape, or even to monopolize, public discussions of the matter, despite their lack of formal training in many of the relevant areas and their inclination to transform their personal views into public policy. This trend is particularly troubling where the social problem at issue implicates deep-seated notions of morality, financial responsibility, and appropriate sexuality. When prosecutors consider themselves "Sex Czars" and feel empowered to demarcate the boundaries of suitable romantic relationships in their communities, there is cause for concern.

Secondly, although the government might allocate criminal justice funds to a difficult issue in order to signal its commitment to

12. As I discuss in more detail below, some of these same objections have been raised by police who have experienced the problem-solving model. However, the evidence contained herein demonstrates that prosecutorial objections are more far-reaching and troublesome, given the fundamental differences between the nature of police work and the nature of prosecutorial work.

finding a solution, prosecutors' comments reveal the extent to which the new prosecution's problem-oriented approach can limit, rather than expand, the menu of options available to ameliorate these larger pathologies. Prosecutors are, by education, training, and attitude, litigation attorneys; they think in terms of building individual cases and fashioning appropriate sentencing provisions that do not typically include long term policies, job-training seminars, or self-esteem workshops. This is the mindset and tool kit that prosecutors bring to the job, despite the broader rhetoric of a problem-oriented, policy-focused program. By placing social problems inside the criminal justice framework without changing the fundamental orientation of the officials charged with addressing these problems, we ensure that the traditional apparatus of the criminal justice system—conviction, punishment, and surveillance—will be the only strategies considered by the problem-solvers.

This Article proceeds as follows. Part I introduces the Statutory Rape Vertical Prosecution Program that took shape in California in the mid-1990s. In addition to explaining how this program emerged and its central features, I highlight the aspects of the SRVPP that distinguish California statutory rape prosecutors from the traditional image of the local prosecutor in the United States. Part II offers some background on the new prosecution and the problem-oriented approach to criminal justice, explaining how this model differs from the traditional crime-based or case-based method of criminal justice work. In Part III, I use empirical data derived from surveys and interviews with prosecutors to explore more fully the ways in which the new prosecution's problem-oriented model has taken hold in the SRVPP units across California, and I compare the successes of this approach to those described in the literature about problem-oriented policing. I address prosecutorial resistance to the new prosecution in Part IV. In Part V, I discuss the implications of these problems for prosecutors and the gendered nature of these effects. I then speculate as to why these issues have proved to be more salient in the prosecution context than in the police arena and suggest ways in which the institution of prosecution might be reformed to accommodate the new prosecution's problem-solving, crime reduction strategies. In Part VI, I examine the implications of the new prosecution's wide-ranging problem-oriented approach for victims and defendants, as prosecutors' ideas about responsibility, commitment, and appropriate relationships are given strength through the new social worker role. I lastly consider the impact of the new prosecution on society generally, given the symbolic and real-world consequences of reconstructing old social problems as new issues for the criminal justice system to solve.

II. THE EMERGENCE OF THE STATUTORY RAPE VERTICAL PROSECUTION PROGRAM

The Statutory Rape Vertical Prosecution Program was created in the mid-1990s in direct response to concerns about rising teen birth rates, welfare reliance by teenage mothers, and the cycle of poverty many (mistakenly) believed to result from these trends.[13] Although these problems typically are not regarded as within the scope of the criminal justice system, California's governor turned to the criminal law after concluding that other institutions had failed to address these crises.

In the late 1980s and early 1990s, many policymakers became concerned about two alarming trends: the growing number of pregnant teens (and of children born to teen mothers) and the rising percentage of Aid to Families with Dependent Children ("AFDC") recipients who remained on welfare for years. At the intersection of these troubling trends lay the teen mother/AFDC recipient, whom some commentators predicted would continue to have more children

13. In the 1980s, when policymakers and politicians perceived an ongoing epidemic of teenage pregnancy, they focused attention specifically on the number of unwed mothers who sought public assistance for themselves and their children. Under the banner of "family values," some lawmakers argued that welfare dependency had become a way of life that the government should discourage, invoking myths about the cycle of poverty and decrying poor women's tendencies to bear additional children in order to receive additional funds. Some analysts pointed to teenage mothers as the crux of the problem, contending that these young women were directly responsible for high welfare caseloads and costs. *See, e.g.*, 133 CONG. REC. 35,826-27 (1987) (statement of Rep. Roukema) [hereinafter Roukema Statement]; STUART BUTLER & ANNA KONDRATAS, OUT OF THE POVERTY TRAP: A CONSERVATIVE STRATEGY FOR WELFARE REFORM 137-142 (1987); IRWIN GARFINKEL, INST. FOR RESEARCH ON POVERTY, THE ROLE OF CHILD SUPPORT IN ANTIPOVERTY POLICY (1982). Indeed, the cycle of unwed pregnancy and welfare was denounced as a "social pathology," marked by "runaway teen pregnancies that lead to a lifetime of welfare dependency and a dead-end road to a future." B. Drummond Ayres, Jr., *Marriage Advised in Some Youth Pregnancies*, N.Y. TIMES, Sept. 9, 1996, at A12 (quoting California Governor Pete Wilson). This welfare myth has been largely debunked. *See, e.g.*, MARIAN WRIGHT EDELMAN, FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE 52-53 (1987); Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274 (1991). Kristin Luker, in her pathbreaking work DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY (1996), convincingly argued that while the evidence linking poverty and teen pregnancy is sound, the causation arrow should point in the other direction: teenagers who carry to term once they become pregnant are already poor; they do not become poor just because of the pregnancy. In other words, becoming a teen parent does not cause poverty; poverty is a significant predictor of teen motherhood.

in order to collect more benefits.[14] But when several studies in the early 1990s demonstrated that adult men father a significant portion of the babies born to teen mothers,[15] the stereotype of the irresponsible, selfish young welfare mother was challenged; state and federal governments instead looked to increased enforcement of statutory rape laws as the answer to the teen pregnancy and welfare dilemma. Although later scholars attacked the data concerning the percentage of adult fathers responsible for these pregnancies,[16] this battle of the statistics was largely ignored by government policy-makers who desperately sought an end to the teen pregnancy crisis and capitalized on public contempt for resource-draining welfare queens during difficult economic times.

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14. *See, e.g.*, Roukema Statement, *supra* note 13, at 35,827; BUTLER & KONDRATAS, *supra* note 13, at 137-42; Garfinkel, *supra* note 13.

15. *See, e.g.*, David J. Landry & Jacqueline Darroch Forrest, *How Old Are U.S. Fathers?*, 27 FAM. PLAN. PERSP. 159, 160 (1995); Mike Males & Kenneth S.Y. Chew, *The Ages of Fathers in California Adolescent Births, 1993*, 86 AM. J. PUB. HEALTH 565, 567 (1996).

16. The battle of the statistics stems from the differing approaches taken by researchers in classifying their samples and in framing their research questions: does the the study include nineteen year-old mothers because they are technically "teenagers," even though they are not under the age of consent in any state? Is the researcher concerned only about large age differences between the sexual partners (five or more years), or will she report any age difference as significant? For example, Males and Chew reported that, between 1990 and 1993, seventy-five percent of the babies born to high school seniors (a group that includes eighteen and nineteen year-olds) were fathered by men eighteen or older. Males & Chew, *supra* note 15, at 565-67. These findings were reinforced by a 1996 study, which reported that almost two-thirds of mothers aged fifteen to nineteen have partners who are twenty or older, although the vast majority of these mothers are eighteen or nineteen years-old and have partners within two years of their age. Rebekah Saul, *Using—and Misusing—Data on Age Differences Between Minors and Their Sexual Partners*, 2 GUTTMACHER REP. ON PUB. POL'Y 10, 10-11 (1999). In the spring of 1997, however, an Urban Institute study demonstrated that only twenty-one percent of babies born to unmarried minors (aged fifteen to seventeen) were fathered by substantially older men, and only eight percent of all births to fifteen to nineteen year-olds were to unmarried minors with a partner five or more years older. Laura Duberstein Lindberg et al., *Age Differences Between Minors Who Give Birth and Their Adult Partners*, 29 FAM. PLAN. PERSP. 61, 62-63 (1997). The authors also reported that nearly two-thirds of all teen mothers are eighteen or nineteen years-old. *Id.* In 1999, other researchers found that sixty-four percent of sexually active women aged fifteen to seventeen had a partner within two years of their age, while only seven percent had a partner who was six or more years older. Jacqueline Darroch et al., *Age Differences Between Sexual Partners in the United States*, 31 FAM. PLAN. PERSP. 160, 163 (1999).

In California, government strategists led by Governor Pete Wilson seized upon these early findings to promote full-scale enforcement of the already-existing statutory rape laws, which criminalized sexual conduct with minors under eighteen.[17] According to the Governor, renewed and vigorous enforcement of the statutory rape law would serve three important purposes: (1) it would deter men from having intercourse with underage females by increasing their fear of apprehension and punishment; (2) it would thereby reduce the number of underage females becoming pregnant and consequently reduce the number of underage females seeking AFDC; and (3) it would identify the fathers of underage pregnant teens and thereby force those men to pay child support. This marriage of welfare and moral regulation led to a host of new programs, including the formation of SRVPP units in local district attorneys' offices across the state.[18]

In fiscal year 1995-96, amidst waves of national and state rhetoric documenting the burdens of teenage pregnancy and welfare reliance, California's Governor Pete Wilson decried the unraveling of the very fabric of our society caused by absent fathers.[19] As part of a

17. Section 261.5 of the California Penal Code makes it a crime for a person to have sexual intercourse with a person under eighteen who is not that person's spouse. Section (b) of the statute indicates that this crime is a misdemeanor and is punishable by up to one year in county jail. Section (c) specifies that if there is more than a three-year age difference between the victim and the defendant, the crime is punishable as a misdemeanor or as a felony with a maximum term in state prison of three years. Section (d) applies if the victim is under sixteen and the defendant is over twenty-one; in that event, the crime is punishable as a misdemeanor or as a felony with a maximum state prison term of four years. CAL. PENAL CODE § 261.5 (Deering 2005). All of these statutory provisions predated Governor Wilson's interest in the law, and none of them were changed in the wake of this program. The new program did add one subsection (261.5(e)) authorizing the criminal courts to impose thousands of dollars in civil penalties on convicted statutory rapists; however, my research revealed that this provision was *never* enforced. Prosecutors had no idea how to ask for or to collect civil penalties, and most believed that few of their defendants would have any ability to pay these sums.

18. In traditional prosecution models, a criminal case will be handled by several different attorneys throughout its life: one prosecutor files the case, another conducts the preliminary hearing, a third takes the jury trial and argues sentencing after trial, and a fourth might handle probation or parole violations. Vertical prosecution drastically reduces the number of fingerprints on the case file by requiring one prosecutor to handle the case from filing onward. RANDY BONNELL ET AL., GOVERNOR'S OFFICE OF CRIMINAL JUSTICE PLANNING, AN EVALUATION OF STATUTORY RAPE VERTICAL PROSECUTION PROGRAM 15 (2001). For additional information about vertical units, see *infra* note 79.

19. Governor Pete Wilson, Second Inaugural Address, California: Forging America's Future (Jan. 7, 1995). California was not alone in generating this focus on fathers. The federal government, in the 1996 Personal Responsibility

more comprehensive program to address the epidemic of accountability and moral failures brought on by illegitimacy and welfare dependency, Governor Wilson asked the California Legislature to appropriate $12 million to the Department of Health Services for the Teen Pregnancy Prevention Initiative, a network of teenage-pregnancy prevention strategies specifically aimed at teens, males, and welfare recipients. Specifying that almost half of the $12 million should target males,[20] the Governor declared:

> Two-thirds of the babies born to teen girls are known to be fathered by adult men, yet very large numbers of these men have minimal or no involvement in the prevention (contraception) or consequences (parenting and support) of pregnancy. Studies show that many unwed fathers knowingly engage in sexual intercourse without any thought of its consequences and are unprepared for fatherhood. Traditionally, it has been the female who shoulders the responsibility for contraception and, all too often, for the pregnancy outcome.[21]

In May of 1995, the Governor explicitly mentioned the lack of enforcement of the preexisting statutory rape laws as part of the problem:

> [S]tudies have shown that 84 percent of fathers of children born to adolescent mothers live apart from their children and that many unwed fathers knowingly engage in sexual intercourse with little thought about the consequences of an unplanned pregnancy or responsibilities of fatherhood. Further, although statutory rape is a punishable offense, the

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and Work Opportunity Reconciliation Act ("PRWORA"), also embraced the principle of placing primary responsibility for children on fathers, thereby relieving taxpayers of the burden. In so doing, it required the states to devise plans to investigate improved statutory rape enforcement in return for block grants of welfare money. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. California developed the most extensive and well funded plan in the nation.

20. In a Finance Letter drafted by the Governor's Office in support of the Teen Pregnancy Prevention Initiative, the amount was set at $5.5 million. It was later modified to $5.25 million, as discussed in the text. Finance Letter for Fiscal Year 1995-96 from Health Services Department (May 19, 1995) (on file with the author).

21. Governor Pete Wilson, Budget Change Proposal for Fiscal Year 1995-96, Teen Pregnancy Prevention Initiative (Jan. 11, 1995) (on file with author) [hereinafter Wilson, Teen Pregnancy Prevention Initiative].

> law is not aggressively enforced[,] and criminal sanctions are rarely imposed in statutory rape cases.[22]

According to the Governor's budget documents, the requested $12 million would be used to accomplish the following three goals:

- Promote and expand effective teen pregnancy prevention programs and strategies (a goal which includes "utiliz[ing] advertising and public relations strategies to promote the societal norm that sexual activity is inappropriate for adolescents"),

- Broaden the focus of teen pregnancy prevention efforts beyond teen mothers to the role of fathers (a goal that includes "deliver[ing] educational interventions that will lead to a change in social norms among young men, including responsibility for the consequences of their sexual behavior"), and

- Ensure that teen pregnancy prevention strategies are coordinated with and complement California's existing and proposed welfare reform efforts (a goal which includes "increas[ing] AFDC recipient awareness of the benefits of actively planning the number and timing of their children").[23]

In short, the Governor asked for millions of dollars to target teen pregnancy from all angles: promoting abstinence, holding males accountable, and reforming the welfare system.

As part of the second, male-targeted component of the program, the Governor originally requested $150,000 to fund efforts at one local district attorney's office to vertically handle violations of existing statutory rape laws including prosecution, child support, and paternity actions.[24] However, at some later unspecified time,

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22. Governor Pete Wilson, Finance Letter for Fiscal Year 1995-96, California's Teen Pregnancy Prevention Initiative: Comprehensive Efforts to Help Men Address Pregnancy Prevention (MAAP), at 8 (May 18, 1995) (on file with author) [hereinafter Wilson, Comprehensive Efforts].

23. Wilson, Teen Pregnancy Prevention Initiative, *supra* note 21.

24. Wilson, Comprehensive Efforts, *supra* note 22. Sources involved in the SRVPP at its onset attribute the idea of creating special statutory rape vertical units to two executives in the Governor's Office of Criminal Justice Planning ("OCJP"), Cheryl Mouras Ashby (the Director of Children's Branch of OCJP) and Janet Shaw (the Chief Deputy Director of OCJP). Based on their experience with California law enforcement, these two women realized that if California wanted to get serious about increasing enforcement for an otherwise

that request was transformed into a much larger project.[25] The Governor eventually asked for $2.4 million to institute vertical prosecution units in the sixteen counties that experienced most of the state's teen births; this money would be administered through the Governor's Office of Criminal Justice Planning ("OCJP") and would supplement the $2.85 million requested for male responsibility local intervention efforts. All in all, the Teen Pregnancy Prevention Initiative sought $5.25 million in its initial year of operation to target males for "irresponsible" sexual behavior with adolescent girls.[26]

The Governor's combination of statistics, rhetoric, and fear proved to be a powerful influence on the California legislature. As

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low priority crime like statutory rape, specialized vertical units were the answer. For additional information about the benefits of vertical prosecution approaches, see *infra* note 79.

25. Department of Health Services, Revised Funding of Program Components (Dec. 12, 2000) (on file with author).

26. In June of 1995, the Governor went public with his plan to step up statutory rape enforcement as a mechanism to combat California's teen pregnancy and welfare problems. Convening the Focus on Fathers Summit (co-sponsored by the California Governor's Office and the Department of Health and Human Services), he stressed to the public the linkage between male responsibility, welfare reliance, and the epidemic of teenage pregnancy: "We've got to teach our young men that if you father a child . . . [i]t's your responsibility, not the taxpayers'." Governor Pete Wilson, Opening Remarks at the Focus on Fathers Summit (June 13, 1995) (on file with author).

Just after the summit, the Wilson Administration Talking Points newsletter featured the Governor's new plan to reduce teen pregnancy through increased statutory rape enforcement:

> The growing crisis of fatherless families is having tragic consequences in our society – higher rates of welfare dependency, violent crime and high school dropouts. . . .
>
> . . . .
>
> To combat teen pregnancy, Governor Wilson:
>
> - Is calling for a $12 million initiative in his 1995-1996 budget proposal to prevent teen pregnancy. The initiative gives "block grants" to communities to support local anti-teen pregnancy programs, funds programs aimed at promoting male responsibility, and creates an information campaign about teen pregnancy directed at welfare recipients.
>
> . . . .
>
> - Proposes funding for special prosecution units in district attorney offices of sixteen counties so that California's statutory rape laws can once again be strongly enforced.

Governor's Office of Public Affairs, Wilson Administration Talking Points: Focusing on Fathers (June 21, 1995) (on file with author).

reflected in the Teenage Pregnancy Prevention Act of 1995,[27] the legislature made the following findings in conjunction with appropriating the $12 million requested by the Governor:

> (a) Illicit sexual activity between adult males and teenage or younger girls in this state is resulting in the nation's highest teenage pregnancy and birth rate. . . . Many of these adult males . . . accept little or no responsibility for their actions or for the support of their children. . . .
>
> (b) California spent $3.08 billion in 1985 to assist families headed by teenagers. . . .
>
> (c) *Society can no longer ignore the disregard of statutory rape laws and the consequent increase in teenage pregnancies. The laws prohibiting adults from having sexual relations with persons under the age of 18 years must be more vigorously enforced. Adult males who prey upon minor girls must be held accountable for their conduct and accept responsibility for their actions.*
>
> (d) *It is the intent of the Legislature that district attorneys vigorously investigate and prosecute adults guilty of unlawful sexual intercourse with a minor, particularly where that unlawful sexual intercourse results in pregnancy. . . .*[28]

In support of the goals identified in the Teenage Pregnancy Prevention Act of 1995, the legislature authorized funds to support a multiagency approach to teen-pregnancy prevention, including the designation of special statutory rape prosecutors, the dispersal of AFDC informational literature, the formation of local intervention programs, and the development of a statewide media campaign called the Partnership for Responsible Parenting that began in fiscal year 1996-97.[29] But the statutory rape enforcement component was not simply a rhetorical call to arms. The Governor had promised specialized enforcement units within county prosecutors' offices and the legislature had called for vigorous enforcement of the laws; the

27. 1996 Cal. Stat. ch. 789 (codified as CAL. PENAL CODE § 261.5 (Deering 2005)).

28. *Id.* (emphasis added).

29. OFFICE OF THE GOVERNOR OF CAL., GOVERNOR'S BUDGET SUMMARY 1996-97, at 113 (1996) (on file with author).

new teen-pregnancy prevention coalition had to find a way to make that happen.[30]

With the receipt of $2.4 million, the OCJP designed and implemented the pilot SRVPP in 1995. It selected sixteen counties to participate, each of which was given $150,000 to create a specialized unit to aggressively root out and prosecute statutory rapists.[31] The State Budget Act of 1996 allocated to OCJP approximately $6 million in additional funds for the SRVPP project, to allow the program to expand to all fifty-eight counties on a non-competitive basis.[32] This augmentation increased the state's allocation of funds for the SRVPP from $2.4 million to almost $8.4 million in fiscal year 1996-97, and the funding remained at this level for seven years.[33] As of fiscal year 2002-03, the state had spent more

30. Pursuant to the Governor's final budget plan, the Department of Health Services transferred $2.4 million of its initial $12 million allocation to OCJP. This transfer is simply a line item in the DHS budget records; it required no special legislative approval or statutory authorization. The aggressive campaign to prosecute statutory rape in California began as a behind-the-scenes shift of resources from one agency to another.

31. In coordination with the Department of Health Services and the Department of Social Services, OCJP designed the criteria on which selection for the pilot group was based: every county was ranked according to the number of live births to unwed minor females (aged twelve to seventeen) that were fathered by adult males over the age of twenty-one in the year 1993. BONNELL ET AL., *supra* note 18. To be clear about the statutory parameters of this crime, "statutory rape" refers to intercourse with anyone under eighteen. *See* CAL. PENAL CODE § 261.5(a). California has a different statute that prohibits molestation of children under fourteen. *See id.* § 288(a). Thus, the new enforcement program was meant to target men who have sex with teens aged fourteen to seventeen.

32. BONNELL ET AL., *supra* note 18.

33. Funding for the SRVPP is authorized annually in the California State Budget Act under Item 8100-101-0001, Schedule 50.30.515 (informally known as "a line in the Governor's Budget"). BONNELL ET AL., *supra* note 18, at 9-14. While the Governor's budget must be approved by the California legislature each year, there has been no legislative input into the SRVPP and no statutory amendments to reflect or secure its existence. Each year, its existence depends on placement within the Governor's budget and continued approval of funding by the legislature.

In fiscal year 2003-04, pursuant to the Budget Act of 2003, the funding structure changed: SRVPP was consolidated with other vertical prosecution grant programs (including those that target child abuse, major narcotics venders, elder abuse, and career criminals) into one master vertical prosecution grant program administered by the state, and the state budget for this master program totals approximately $8.2 million annually. Counties now apply to the state for general vertical prosecution funds, but each county has the ability to determine which specific vertical units it wants to run. Since this restructuring, approximately half of the counties have retained their SRVPP

than $60 million on its SRVPP. District attorneys' offices in all but two counties[34] established special prosecution units devoted exclusively to the handling of statutory rape cases and most secured cooperation from their family support divisions to facilitate referrals of past and present pregnant and parenting teens to the specialized units.

OCJP and the Governor's Office broadcast the social reform agenda to local prosecutors right from the beginning. One prosecutor who was involved in the formation of the SRVPP recalls:

> Well I think that, for . . . the Partnership for Responsible Parenting there was no focused way to have any enforcement of [male responsibility]; we've got to change the situation. So the Department of Education, they couldn't do anything with this problem that was brought to our attention and so the only logical choice that was left was we'd have to give money to prosecutors, because there was no other enforcement of, if we're saying we want this behavior to stop, how do we make it stop? And that was the only way to make it stop.[35]

She continued:

> [I]n the most technical way there already existed a law. So what my recollection is that when they were trying to figure out how to have some teeth to the other programs, it couldn't be all this touchy, feely stuff because the touchy, feely stuff wasn't going to change the teenage behavior necessarily and was never going to make the men do anything. . . . They didn't see how they could do something initially to compel some kind of enforcement through family support. So we were the logical existing place.[36]

Families, churches, schools, and welfare case workers, with their soft, "touchy-feely" approaches to the problems of teen pregnancy and teen sexuality, had let California down. State

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units; the remaining counties have allocated their funds and efforts to other crimes. Moreover, pursuant to some shake-ups in the California state government, the vertical grant program is now administered by the Office of Emergency Services, as OCJP has been dissolved. Telephone Interview with Gwen Sarine, Administrator, Office of Emergency Services, State of California (May 4, 2004).

34. While in some years more than two counties declined to participate, typically only two of the smallest counties in the state (by population) did not operate an SRVPP. For more information about the current status of the program, see *supra* note 33.

35. Interview with Prosecutor 1, Ruby County, in Ruby County (Dec. 11, 2001) (on file with author).

36. *Id.*

policymakers believed that local prosecutors could succeed where the others had failed because they had the ultimate "teeth"—the ability to throw people in jail for nonconformity and noncompliance.[37] SRVPP prosecutors were thus charged not only with enforcing the age of consent law against adults who had sex with teens, but also with changing teenage sexual and childbearing behavior.

County prosecutors across the state got the message. One prosecutor understood this lofty goal as "social engineering through criminal prosecution."[38] While there was not immediate widespread support for the program or its mission, prosecutors were told by the state that each county's receipt of funds depended entirely on its participation in the program and collection of data to support the program objectives. Counties that wanted the money—and more than ninety percent of them did—jumped on board, in behavior if not entirely in spirit.[39]

In order to receive the grant funds, each applicant county had to prepare a project design detailing how it would use the grant funds to prosecute violations of existing statutory rape laws, including obtaining child-support orders. The project design was left to the county's discretion, but applicants were required to explain their plans for finding new cases, for coordinating prosecution and child support orders, and for providing services to victims. Offices were strongly urged to follow the vertical prosecution model[40]—to assign one prosecutor to handle each case from filing through sentencing—and to develop mechanisms for outreach with community agencies, medical providers, and schools to generate case referrals and to spread the word about enforcement. Additionally, each county had

37. One prosecutor opined that only district attorneys had the ability to force welfare offices to disclose confidential files. *See* Interview with Prosecutor 1, Carlisle County, in Carlisle County (Oct. 22, 2001) (on file with author).

38. Interview with Prosecutor 1, Fulton County, in Fulton County (Nov. 28, 2001) (on file with author).

39. BONNELL ET AL., *supra* note 18.

40. In theory, three models of vertical prosecution are possible. In True Vertical Prosecution, one prosecutor handles the case from filing through sentencing. In Major Stage Vertical Prosecution, one prosecutor must make all significant appearances, but colleagues may handle minor matters. Unit Stage Vertical Prosecution recommends that one prosecutor handle all significant appearances, but allows for other colleagues to handle them (provided they are experienced sex crime prosecutors) in extraordinary circumstances. All three models are permissible in the SRVPP units, but the state administrators of the program strongly encourage counties to use the True Vertical Prosecution model. BONNELL ET AL., *supra* note 18, at 16. Most counties, but not all, followed this recommendation.

to enumerate specific numerical objectives by which its progress could be measured and to promise to collect data on particular aspects of enforcement: the number of case filings, the dispositions of cases, the number and type of referrals for victims, the number of child-support orders issued and enforced, and ages of the father/defendant and mother/victim at date of child's birth.[41]

According to this program design, the SRVPP prosecutor was expected to be far more active than her conventional counterparts in generating cases and in handling her potential victim population. County prosecutors in the United States typically have been portrayed as reactive legal actors, advocating on behalf of the state to charge, prosecute, gain convictions, and secure appropriate punishment for law violators who come to the attention of local police. Most prosecutors have no control over their incoming caseload: they review the cases brought to them by police agencies and rarely have a hand in directing prefiling investigation or case generation.[42] The customary relationship between police officer and

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41. Note that this final category contains two important assumptions: (1) the defendant will be male and (2) the victim will not only be pregnant, but will also give birth. Both of these assumptions underlie the original goal of this program, which was to reduce the state's responsibility to pay for the children of teen mothers.

The categories of data to be collected evolved over time, as prosecutors and bureaucrats responded to concerns from the state legislature about sexual predators: the more recent statistical information pays considerably more attention to the criminal history of the defendant pool than to the pregnancy or welfare status of the victim. For a closer look at this shift in SRVPP priorities, see Levine, *supra* note 5, at 138-45.

42. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 33-34; *see also* DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE 15 (2002). While some prosecutors in specialized units initiate investigations (organized crime and public integrity/fraud/corruption units, for example), this is far from the norm in local prosecution offices. JOHNSON, *supra*, at 15; Coles & Kelling, *Emergent Strategies*, *supra* note 9 at 34. As a result of this trajectory, most research on prosecutors has centered on their filing decisions and the use of discretion therein. Studies of prosecutorial discretion take as their starting point the pre-existing police report and then interrogate how that police report is transcribed into an indictment or complaint. Since the case mortality studies of the Progressive Era first documented the role of the prosecutor in determining the outcome of a criminal case, scholars have tried to ascertain which factors, both structural and case-based, influence whether and to what degree a prosecutor transforms a reported crime into a criminal complaint. From these studies a rich literature about prosecutorial discretion has emerged; we now recognize that when filing cases prosecutors often temper their responsibility to enforce the law with considerations of substantive justice and resource constraints, and we can speak generally about prosecutorial styles that foster or hinder the use of discretion in particular settings. *See, e.g.*, W. BOYD LITTRELL, BUREAUCRATIC JUSTICE: POLICE, PROSECUTORS, AND PLEA BARGAINING (1979); FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (Frank J.

prosecutor has been described as follows: "Like any private attorney, [the prosecutor] sits in his office waiting for clients who have legal burdens, in this instance arrest reports. His duty, he knows, is to prosecute these cases for the police just as a private lawyer works for his clients."[43]

Yet by assuming that the prosecutor's involvement in the criminal justice process begins only after the crime has been committed, the suspect identified, and the police report submitted for review, we fail to question whether prosecutors have the ability or the incentive to shape cases and workloads in advance of filing the criminal complaint. The SRVPP directly challenges that assumption by involving the prosecutor at each stage of case generation and by making her responsible for increasing community awareness of both the crime and the anticipated prosecution response.[44]

While other works explore in detail the workings, effects, and implications of this new enforcement campaign,[45] suffice it to say here that the SRVPP led to dramatic increases in the number of arrests, prosecutions, and convictions for statutory rapists in California. During the first year the program was implemented

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Remington ed., 1970); PAMELA J. UTZ, SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT (1978); VERA INST. OF JUSTICE, *supra* note 8; Frank J. Remington, *The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices, in* DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY 73 (Lloyd E. Ohlin & Frank J. Remington eds., 1993); Lief H. Carter, The Limits of Order: Uncertainty of Adaptation in a District Attorney's Office (Sept. 1972) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with University of California, Berkeley Library).

43. ARTHUR ROSETT & DONALD R. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 88 (1976).

44. Of course, saying that local prosecutors can be proactive in ferreting out cases does not mean that they proactively determine the problems the program should address. In fact, the SRVPP was created by the state and imposed on counties with very little (if any) input from local prosecutors about the problems associated with statutory rape. Once state bureaucrats identified the rationale animating the grant program, they told local prosecutors what to do in order to obtain grant funds. The SRVPP thus represents a top-down approach, rather than a bottom-up strategy, to involving prosecutors in identifying community problems.

This trend reveals as much about the state's commitment to assisting needy populations as it does about its understanding of the function of prosecutors. While it has involved the criminal justice system more deeply in the social problem arena, the state's true purpose is to minimize its affirmative obligations to those in need—it has turned to law enforcement to extricate itself from more costly social welfare obligations.

45. *See, e.g.*, Levine, *supra* note 5, at 116-343.

statewide, almost 2,000 new statutory rape unit cases[46] were filed, more than half of which led to convictions; in the following year, there were 2,796 new filings and almost 2,500 convictions.[47] These figures represent an approximate fourfold increase over filing and conviction rates in the early 1990s, before the program began.[48] But more importantly (for our purposes here), it generated an entirely new model of prosecutorial involvement in the crime and in the community. The SRVPP inspired prosecutors to develop links with community-based agencies in order to form a community watch for inappropriate sexual relationships and to involve themselves personally with victims, defendants, and their families in order to promote healthier, more responsible relationships.

In short, the SRVPP appears to have institutionalized a new understanding of the prosecutor's function in local California counties: in coordination with social service agencies, prosecutors have been charged with disentangling the state from a web of wide-ranging social problems. This reconceptualization of the prosecutor's role was not a sudden innovation by California's policymakers. It was rooted in the problem-oriented models of criminal justice that had arrived on the scene several years earlier.

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46. I use the term "statutory rape unit cases," rather than "statutory rape cases," to acknowledge that not every case filed by the units charged a violation of the statutory rape law specifically. The units also filed complaints for child molestation, contributing to the delinquency of a minor, forcible rape, and other penal code violations where appropriate. These filing policies are considered in more detail in Levine, *supra* note 5, at 146-207.

47. Levine, *supra* note 5. My interviewees attribute the unimpressive conviction rate in the first year to two factors: their (and the courts') unfamiliarity with the dynamics of statutory rape cases and the overabundance of cases developed from old family support division files. As to the second factor, many of the newly identified victims who had already established successful relationships with the fathers of their children simply refused to prosecute, and oftentimes the statute of limitations on the crime had run before the prosecution was underway. In subsequent years, prosecutors relied less frequently on welfare case files for referrals and developed most of their caseload from new police reports. Moreover, they taught themselves and the courts how to handle statutory rape victims and how to articulate the harms at stake in these cases.

48. The number of arrests for statutory rape showed a similar dramatic increase after the program was implemented. In 1994, before the program began, there were 573 arrests for statutory rape statewide. By 1996, the number had jumped to 893, an increase of more than fifty percent. By 1998, the annual arrest tally exceeded 1,400—almost two and a half times its pre-program level. BONNELL ET AL., *supra* note 18, at 47.

III. OVERVIEW OF THE NEW PROSECUTION AND OTHER PROBLEM-ORIENTED APPROACHES

Problem-oriented, or problem-solving, techniques in criminal justice emerged in the policing context, as scholars began to argue that "law enforcement officer" was a misleading and overly narrow label for the job of the policeman.[49] Police officers, these observers claimed, are deeply embedded members of the community who are called upon to handle a range of situations involving disputes or difficulties between citizens, and only a relative handful of these issues call for a traditional criminal justice response, namely arrest.[50] For the far larger percentage of challenges that police address through non-formal means, a different approach—one that takes into account community concerns, strengths, and weaknesses—is required.

Assessing this bundle of crime-community issues in a more holistic framework, scholars and innovators (in both the academy and certain police departments) asserted that officers should shift their focus from particular crimes and criminals to larger trends and troublesome situation categories. Police should reorient their patrol skills to identify "problems," groups of related incidents or ongoing situations that concern a significant portion of people who live or work in a given area.[51] Problems are persistent, multi-faceted, and typically manifested (at least in part) by minor criminal behavior. While sometimes the most effective strategy for handling a problem involves making arrests for petty offenses, oftentimes a different approach is warranted: talking with community and business leaders, organizing crime-watch efforts, participating in community events, or providing educational sessions at the community level.[52]

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49. *See, e.g.*, JOHN E. ECK ET AL., PROBLEM-SOLVING: PROBLEM-ORIENTED POLICING IN NEWPORT NEWS (1987); HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING (1990) [hereinafter GOLDSTEIN, POLICING]; David Weisburd & Jerome E. McElroy, *Enacting the CPO Role: Findings from the New York City Pilot Program in Community Policing*, *in* COMMUNITY POLICING: RHETORIC OR REALITY 89-101 (Jack R. Greene & Stephen D. Mastrofski eds., 1988); Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQ. 236, 242 (1979) [hereinafter Goldstein, *Improving*]. For a history of the community policing movement, see MCELROY ET AL., *supra* note 2; WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING: CHICAGO STYLE (1997); GEORGE KELLING & MARK MOORE, U.S. DEP'T OF JUST., THE EVOLVING STRATEGY OF POLICING (1988).

50. Goldstein, *Improving*, *supra* note 49, at 242.

51. WESLEY SKOGAN ET AL., PROBLEM-SOLVING IN PRACTICE: IMPLEMENTING COMMUNITY POLICING IN CHICAGO 3 (2000).

52. Using criminal justice resources to address problems underlying low level crimes might be characterized as the flip-side of "broken windows

These integrative strategies are designed to force police to draw connections between problematic incidents, to grapple with the problem itself and to address its underlying causes, rather than simply to respond to its disruptive or superficial manifestations.[53]

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policing," a policy that encourages police to aggressively arrest low level criminals in order to prevent neighborhood deterioration and more serious criminality. *See* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29. While both approaches aim to improve the conditions and morale of neighborhoods and communities by targeting chronic, petty offenses, problem-oriented policing inspires police to consider alternatives to formal criminal justice intervention, while broken windows policing emphasizes the need for criminal justice sanctions. The causal relationship at the core of the broken windows theory has been challenged by other criminal justice scholars, who point to alternative explanations for the reduction in serious crime experienced by those neighborhoods subjected to aggressive policing. *See, e.g.*, Jack R. Greene & Ralph B. Taylor, *Community-Based Policing and Foot Patrol: Issues of Theory and Evaluation*, *in* COMMUNITY POLICING: RHETORIC OR REALITY 195-223 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (finding no link between incivilities and a weakening of informal social controls and arguing that the apparent linkage between incivilities and crime is largely driven by a third variable—social class); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001); Stephen D. Mastrofski, *Community Policing as Reform: A Cautionary Tale*, *in* COMMUNITY POLICING: RHETORIC OR REALITY 47-67 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (asserting that the broken windows argument incorrectly assumes that the main causes of neighborhood disorder are imported into the neighborhood, rather than intrinsic to it).

53. Adopting a problem-oriented approach requires an agency to restructure its measures of effectiveness. If the crime is the unit of analysis, one can assess effectiveness based on the success of the prosecution that results from an arrest. In contrast, the problem-as-unit-of-analysis model suggests five possible alternative outcomes or degrees of impact: the agency response might (1) totally eliminate the problem, (2) reduce the number of incidents created by the problem, (3) reduce the severity of incidents created by the problem, (4) design better methods for handling the incidents, or (5) remove the problem from police consideration. ECK ET AL., *supra* note 49, at 49. Because some problems cannot be eliminated completely, Goldstein suggests that we should characterize the principal police objective as "managing deviance," that is, reducing the number and severity of incidents that relate to a given problem while still urging police to look beyond the superficial offensive aspects of the incidents when devising solutions. GOLDSTEIN, POLICING, *supra* note 49, at 36. Note that sociologist Kai Erikson has argued that law enforcement organizations, by their very nature, can *only* manage deviance; they can never eliminate it altogether. The need for constant deviance stems from the relationship between deviance and conformity: communities need to identify deviance to reinforce their moral and behavioral standards. *See* KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 4 (1966). Erikson suggests that while the existence of crime or deviance is a constant, the volume and type of deviance shifts as society's fears, needs, and resources shift. *Id.*

The problem-oriented model is, in other words, "a potential paradigm shift in the organization and delivery of police services in urban America."[54]

By reintegrating the police into the community as problem-solvers, an agency recognizes that law enforcement is merely one institution in any given community responsible for dealing with problems and problematic citizens. It also acknowledges that police authority is greatest in those areas that garner community support for law enforcement activities,[55] and that for criminal justice actors to achieve maximum legitimacy and effectiveness, they must draw upon "organic institutions of the community" to replicate and reinforce preexisting forms of social control.[56] Perhaps most significantly, the problem-oriented model attempts to lessen police reliance on reactive strategies by making officers much more proactive in identifying the interests at stake in a given problem. In short, police can and should rely on means other than the criminal law to get things done. According to police scholar Herman Goldstein, "[this] is a whole new way of thinking about policing that has implications for every aspect of the police organization, its personnel, and its operations."[57]

The problem-oriented, or problem-solving, perspective is thus intrinsically tied to a community-based notion of service: when criminal justice personnel feel more connected to the communities they serve, they will try to solve underlying problems rather than seek punishment for a particular criminal act. An agency

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(citing EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 101 (George Simpson trans., 1964)).

54. MCELROY ET AL., *supra* note 2, at 175.

55. *See* SKOGAN ET AL., *supra* note 51, at 5-7, 9-11, 27-31 (providing empirical proof of this assumption).

56. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 37 (quoting District Attorney Ronald Earle of Austin, Texas).

57. GOLDSTEIN, POLICING, *supra* note 49, at 3. Along these same lines, McElroy and his colleagues write:

> [Community, problem-oriented policing], if it is implemented with even a modest level of integrity, . . . will soon force a reconsideration of virtually all departmental operations and structures: the nature of the agency's mission; the grounds on which it claims legitimacy; the nature of its relationship to the political and social environment; the services it offers; the delivery strategies it uses; the criteria and processes through which it allocates its resources; the roles it requires its members to perform; the coordinating and management processes it relies on; the methods it uses to assess, control, and reward performance; and the values, goals, objectives, and procedures in which it trains its people. . . .

MCELROY ET AL., *supra* note 2, at 186.

committed to solving problems will not just process identified law-breakers; it will amass a broader set of data about the underlying problems by canvassing neighborhoods, conducting surveys, and reviewing social science literature.[58] Taking this approach to problems reflects a conscious choice to shift resources away from the simple process of adjudicating guilt or innocence and into the provision of treatment and preventative services.[59] Moreover, a police agency committed to understanding the nature of the problems faced by the local community will be more likely to examine critically its own responses and to create innovative solutions.[60]

Some criminal justice scholars have suggested that problem-oriented approaches can be used to restructure courthouses as well as police stations. Malcolm Feeley, for example, argues that a problem-oriented court would pay particular attention to the details of administration and would be concerned with the real-world effects of its procedures and priorities.[61] Rather than simply responding to legislative rhetoric or outsider initiatives to streamline caseload management, the new court would devise policies based on the inputs of judges, jurors, prosecutors, public defenders, private attorneys, clerks, and litigants in an effort to identify the root causes of user frustration and delay. Moreover, it would accomplish change incrementally, rather than through bold new programs that ultimately have little chance of succeeding. Feeley suggests that this final characteristic inevitably makes problem-oriented approaches unpalatable to many American policymakers, who prefer

58. For example, community police officers in New York input all kinds of data and questions about neighborhood activity into an "electronic beatbook" whose contents are accessible to all other community officers. The beatbook might contain information about contacts within the Sanitation Department, the location of suspicious vehicles, and local community events and neighborhood association meetings. *See* VERA INST. OF JUST., PORTFOLIO OF DEMONSTRATION PROJECTS, RESEARCH & TECHNICAL ASSISTANCE 5 (July-Dec. 1992).

59. Feinblatt & Denckla, *supra* note 1, at 210 (statement of Scott Newman).

60. Several scholars have conducted empirical studies on newly emergent problem-oriented or community-oriented policing programs, attempting to measure their effects on crime rates, fear levels, and the volume of calls-for-service. *See, e.g.*, ECK ET AL., *supra* note 49; GOLDSTEIN, POLICING, *supra* note 49; POLICE FOUNDATION, THE NEWARK FOOT PATROL EXPERIMENT (1981); WESLEY G. SKOGAN ET AL., ON THE BEAT: POLICE AND COMMUNITY PROBLEM-SOLVING (1999) [hereinafter SKOGAN, ON THE BEAT]; SKOGAN ET AL., *supra* note 51; ROBERT TROJANOWICZ, AN EVALUATION OF THE NEIGHBORHOOD FOOT PATROL PROGRAM IN FLINT, MICHIGAN (1983); Weisburd & McElroy, *supra* note 49.

61. MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 209-10 (1983).

to herald sweeping changes under the banner of simplicity and thumb their noses at careful but mundane tinkering of existing schema, institutions, or procedures.[62]

While Feeley was principally concerned with the handling of court administrative matters, case-focused, therapeutic, problem-oriented courts have sprung up across the United States in the past decade. Drug courts, domestic violence courts, mental health courts, and community-based courts are beginning to handle a significant portion of the local criminal court caseload in many jurisdictions. Their development has been attributed to the confluence of a number of social and historical forces, including:

- [b]reakdowns among social and community institutions (including families and churches) that have traditionally addressed problems like addiction, mental illness, quality-of-life crimes, and domestic violence;
- the inability of other government institutions (both legislative and executive) to address these problems;
- [a] surge in the nation's incarcerated population [and judges' frustration with their restricted sentencing discretion that produced this overpopulation];
- trends emphasizing the accountability of public institutions, along with technological renovations [in] documentation and analysis of court outcomes; [and]
- advances in the quality and availability of therapeutic interventions.[63]

In contrast to the traditional case-oriented court, problem-solving courts are generally characterized by "enhanced judicial oversight, lengthier case management (including postsentencing

62. *Id.* at 210.

63. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 128 (2001); *see also* Dorf & Fagan, *supra* note 3, at 1501-02 (identifying the three principal institutional imperatives that gave rise to the drug court movement). Note also that the criminalization of behaviors previously downplayed or considered outside the scope of the criminal justice system (such as domestic violence) has led jurisdictions to develop alternative types of courts to handle these offenses and offenders.

supervision), and a general philosophy of restorative rather than retributive justice."[64] The problem-oriented court insists on personal accountability for harms caused but also promotes the idea that the justice system should do more than simply punish the offender.[65] Judges in these courts focus on preventing future harm, designing complex case dispositions and management strategies to supervise, educate, and rehabilitate offenders in order to maintain the social health of the community.

> Problem-solving courts use their authority to forge new responses to chronic social, human, and legal problems—including problems like family dysfunction, addiction, delinquency, and domestic violence—that have proven resistant to conventional solutions. They seek to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behavior of litigants and ensuring the future well-being of communities. And they attempt to fix broken systems, making courts (and their partners) more accountable and responsive to their primary customers—the citizens who use courts every day. . . .[66]

While some problem-oriented courts tout the benefits of their specialized jurisdictions—i.e., by concentrating exclusively on particular crimes they can develop a particular expertise—community-based courts in Brooklyn and elsewhere point to their lack of specialization as the key to successful problem solving.[67] Because the same community court judge has the authority to handle the panoply of complaints brought by or against a community resident (crime, housing, credit, etc.), she can, at least in theory, devise holistic solutions to the set of problems rather than

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64. Jeffrey A. Butts, *Introduction: Problem-Solving Courts*, 23 LAW & POL'Y 121, 121 (2001); *see also* Feinblatt & Denckla, *supra* note 1, at 207. Some scholars have noted that the juvenile court, created at the turn of the twentieth century, was the first problem-oriented court in the United States. *See, e.g.*, Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1515 (2003).

65. Drug courts in particular are inclined to adopt a medicalized model of deviance, treating nonviolent offenses committed by drug addicts as medical problems that could be resolved with treatment rather than punishment. JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 133-38 (2001). The treatment model is more difficult to maintain in domestic violence courts, where the idea of "treating" someone who has the propensity for violence may appear inappropriately to excuse his violent behavior. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 185-86 (2000); Dorf & Fagan, *supra* note 3, at 1507.

66. Berman & Feinblatt, *supra* note 63, at 126.

67. *Id.* at 127-28; Dorf & Fagan, *supra* note 3, at 1508.

address some issues in a way that aggravates the others.[68] In either case, "[p]roblem-solving courts are moving the legal system away from a bureaucratic, state-centered perspective and toward a framework that sees each court embedded in the community from which it draws its clientele."[69]

The community-based, problem orientation has also begun to make its way into prosecutors' offices across the United States, instigating a trend I term "the new prosecution."[70] In jurisdictions committed to the new prosecution model, the goals of the prosecutors' office include not only felony case processing but also reducing and preventing crime, addressing public disorder and misdemeanor offenses, and strengthening bonds with citizens. In

68. My goal here is not to debate fully the benefits and burdens of these problem-oriented courts; other scholars have already undertaken that task with much enthusiasm and skill. *See, e.g.*, Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573 (2003); McCoy, *supra* note 64; James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541 (2003); Laurie O. Robinson, *Commentary on Candace McCoy*, 40 AM. CRIM. L. REV. 1535 (2003); William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM. CRIM. L. REV. 1595 (2003). Instead, I provide this information on problem-solving courts as a theoretical backdrop to my investigation of problem-solving models in prosecution settings.

69. Butts, *supra* note 64, at 123.

70. Community-oriented public defender services have also appeared, most notably in Harlem, New York, pursuant to a project sponsored by the Vera Institute of Justice. The Neighborhood Defender Service strives to provide client-centered service, rather than case-centered representation, and its team of lawyers and paralegals assists local clientele with pending criminal matters, forfeitures, deportation, and landlord-tenant disputes. Because the office is housed in the community rather than in the court district, it allows staff to investigate cases earlier and to have easier access to witnesses and community resources for assisting the clients. It also encourages the local population to think of the Neighborhood Defender Service as their local law firm. For more information about this program, see THE NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, 1993 ANNUAL REPORT (1994); VERA INST. OF JUST., PROGRAM PLAN FOR THE NEIGHBORHOOD DEFENDER SERVICE (1990). For a thoughtful and passionate defense of holistic defense work in the South, see Douglas Ammar, *Indigent Defense: Georgia Justice Project Turns Lives Around Through Aggressive Defense, Holistic Relationships*, 28 CHAMPION 50 (Jan./Feb. 2004); Douglas Ammar & Tosha Downey, *Transformative Criminal Defense Practice: Truth, Love, and Individual Rights—The Innovative Approach of the Georgia Justice Project*, 31 FORDHAM URB. L.J. 49 (2003). For discussion of the affinity between problem-solving approaches and criminal defense work generally, see Feinblatt & Denckla, *supra* note 1, at 208; Simon, *supra* note 68, at 1596.

other words, new prosecution models "us[e] case processing and working partnerships to establish community justice."[71]

To achieve this broader vision, designated prosecutors are assigned to local districts or maintain offices in local police stations so as to be more accessible and responsive to the residents of particular neighborhoods. For example, in Austin, Texas, the District Attorney sought to "build accountability to local neighborhoods" by decentralizing prosecution efforts, coordinating with local police chiefs to improve prosecution response to quality-of-life offenses, and assigning young prosecutors to handle nuisance complaints involving gangs and porn shops.[72] In Boston, Massachusetts, and Indianapolis, Indiana, the district attorneys' offices implemented Safe Neighborhood Initiatives (Boston) and "street level advocacy" programs (Indianapolis) to place prosecutors in local police stations to work in partnership with citizens and police and to incorporate "citizen-identified priorities into the prosecution agenda. . . ."[73] Similar programs have been documented in Montgomery County, Maryland and in Brooklyn, New York.[74] In all of these instances, prosecutors report that their community assignments have improved their own understanding of the community's issues and have gained them the respect and trust of police officers and citizens alike.[75]

Locating prosecution offices in regional districts is often part of a broader effort to reduce or to prevent crime and/or to involve local community members in case resolution. For example, the Austin District Attorney's Office has trained community volunteers to handle some juvenile court complaints and has increased mediation and restitution sessions between victims and defendants.[76] In Boston, Juvenile Unit prosecutors meet regularly with school officials, police, probation officers, and youth service providers to

71. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 34.

72. *Id.* at 25.

73. *Id.* at 25-28.

74. Brian Forst, *The Prosecutor and the Public*, *in* THE SOCIO-ECONOMICS OF CRIME AND JUSTICE 291-302 (Brian Forst ed., 1993); Malkin, *supra* note 68, at 1573; Tina McLanus, *Community Criminal Justice: Brooklyn Establishes "Community Courts"*, 4 FOOTPRINTS 15 (1992); Tina McLanus, *Community Criminal Justice: Decentralized and Personalized Prosecution*, 3 FOOTPRINTS 15 (1991). In Montgomery County, Maryland, each deputy prosecutor is assigned to one of five geographic areas within the district and is encouraged to familiarize herself with the local police and community. *Id.* In Brooklyn, the District Attorney has identified five zones based on police precinct boundaries; each zone has its own court and its own set of prosecutors. *Id.*

75. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 25; Forst, *supra* note 74, at 298.

76. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 24.

identify children at risk and to design pre-emptive responses to deviance (including counseling, services, or special school arrangements). Boston prosecutors also collaborate with local police and housing authorities to reduce gang and drug activity in certain housing developments.[77] The Indianapolis District Attorney helped to engineer the Community Justice Pilot project, which involved creating a community court, pre-adjudication diversion programs for juveniles, and a new Criminal Justice Coordinating Council attended by the Public Defender, the Chief Judge of the county court, the Mayor, the Police Chief, the Sheriff, and the Head of Probation.[78]

The new prosecution's problem orientation can also be found in some special prosecution units,[79] particularly those that target drug

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77. *Id.* at 25-26.

78. *Id.* at 27-28.

79. *See generally* BARBARA BOLAND & KERRY MURPHY HEALEY, U.S. DEP'T OF JUST., PROSECUTORIAL RESPONSE TO HEAVY DRUG CASELOADS: COMPREHENSIVE PROBLEM-REDUCTION STRATEGIES (1993).

A separate but parallel trend in prosecutors' offices concerns the development of specialized vertical units to focus on specific categories of crimes involving special types of victims. *See* BONNELL ET AL., *supra* note 18.

Vertical prosecution is a strategy intended to improve prosecutor expertise, responsiveness, and care in cases involving special victim populations or highly sensitive facts, common in crimes of sexual assault, child abuse, and domestic violence. In cases with sensitive facts and/or sensitive or problematic victims, prosecutors believe that a streamlined vertical approach is both more satisfying to the victim (because she does not have to repeat her story multiple times and can rely on one prosecutor to handle all aspects of her case) and more satisfying to the prosecutor (because she can familiarize herself with the facts and the victim early on in the life of the case, maintain control over every case she files, and develop expertise in prosecuting a particular type of crime). SHARON G. ELSTEIN & BARBARA E. SMITH, U.S. DEP'T OF JUST., VICTIM-ORIENTED MULTIDISCIPLINARY RESPONSES TO STATUTORY RAPE: TRAINING GUIDE 17 (2000).

Creating a vertical unit has both instrumental and symbolic effects. Instrumentally, it increases the flow of resources to prosecute a given category of crime, thereby resulting in better, more perceptive case handling and a more expedient result. But it also sends a symbolic message about priority: only high priority crimes deserve this level of attention and resources. Moreover, generally only experienced prosecutors get assigned to vertical units, thereby signaling both that the vertical cases are the most important in the office and that they require special skills only an experienced prosecutor would be expected to possess. *See* Levine, *supra* note 5, at 122-27. Vertical units might have a problem orientation, but this is not intrinsic to the vertical model.

The SRVPP does incorporate a vertical model of prosecution, but its underlying agenda distinguishes it from other straight vertical units. Statutory rape prosecutors in California are not simply designated specialists in statutory rape assigned to handle sensitive cases and victims with care; they have been charged with addressing much broader issues, from teen pregnancy to welfare reliance to adolescent sexuality more generally. *See* Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 71 (describing problem-oriented efforts of

offenders. For example, in Kansas City, Missouri, a special drug prosecution team coordinates its anti-drug effort with non-prosecution professionals who possess expertise in public health, management, community and media relations, and marketing.[80] In addition to providing law enforcement, prevention, and treatment initiatives, the team has developed training sessions to educate landlords and property owners about how to identify and prevent the development of methamphetamine laboratories and how to screen tenants for drug use. This comprehensive effort to stem the tide of drug use, sale, and production has been heralded as nothing short of miraculous.[81]

In sum, the new prosecution's problem-solving model encourages criminal justice actors—police, courts, and prosecutors—to recognize the community as their principal "patron"[82] and to think broadly about the bundles of problems faced by and caused by criminal offenders. In the prosecution context, this entails designating the prosecutor as a leader in the community, encouraging her to work closely with citizen groups, business and service providers, and local government agencies in order to foster a safer environment and a more comprehensive set of social controls. The new prosecution predicts that the prosecutor will become more accountable to the local citizenry, as prosecutorial decisionmaking about cases and offenders becomes more transparent and more accessible.[83] By "reweav[ing] the fabric of [the] community"[84] to include law enforcement and by according citizens power to influence criminal justice priorities, the community-based approach enables the justice system to become an instrument of crime prevention, not just a mechanism for punishment.

IV. THE NEW PROSECUTION IN THE SRVPP

California's SRVPP shares many features with the new prosecution's problem-oriented or problem-solving approach described in the criminal justice literature. Prosecutors in these special units do more than simply prosecute individual offenders; they strive to understand the problems underlying statutory rape, to address issues in the lives of both defendants and victims, to reduce

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prosecutors in special units for domestic violence, sex crimes, or juvenile crimes: community education, community outreach, service on local task forces, and cooperation with hospitals, schools, and social service agencies).

80. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 28-29.

81. *Id.* at 29.

82. Forst, *supra* note 74, at 299 (using the term "patron" to denote both customer and sponsor).

83. *See* Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 36.

84. *Id.* at 37 (quoting District Attorney Ronald Earle of Austin, Texas).

criminal sexual activity affecting teens, and to build connections within the community to address the incidence of this crime. Yet the SRVPP goes well beyond any of the community-based, reduction-of-crime, or drug interdiction approaches previously documented in the prosecution context.[85] This program stimulates prosecutorial involvement in addressing problems that are not strictly criminal in nature; it aims to use the criminal courts and prosecution resources to stem the tide of teenage pregnancy and adolescent sexuality generally. The SRVPP thus has taken the new prosecution's problem-orientation model of criminal justice to an entirely new level.

SRVPP is first and foremost a prosecution campaign, but its success depends heavily on the bridges prosecutors build with other agencies. It was designed as one component of the Partnership for Responsible Parenting, a media campaign whose mission is to reduce teenage pregnancy and to promote male responsibility in sexual and parenting roles.[86] This alliance is not just superficial; problem-oriented prosecutors, like problem-oriented police, must collaborate with other government and community agencies, schools, nonprofit organizations, and youth service providers to learn about community attitudes, crime patterns, and potential resources.[87] This knowledge then can be used for practical purposes: to generate cases, to educate district attorneys about public concerns, and to educate the community about the district attorneys' renewed enforcement strategy. Additionally, SRVPP prosecutors require the assistance of social workers and medical personnel to collect evidence (in the form of DNA samples or sexual assault kits) and to get victims into counseling, both of which lead to the presentation of a stronger case in court.[88] In sum, left to their own devices most

85. Coles and Kelling ultimately concluded that none of the models they studied had achieved a "complete transformation" in its prosecution strategy, but that each had made limited to moderate strides in achieving a community and/or problem orientation. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 37. The program I describe herein resembles many of the aspects of problem-oriented prosecution described by Coles and Kelling, but it is distinguished by its broad underlying social agenda.

86. *See* P'SHIP FOR RESPONSIBLE PARENTING, *at* http://www.dhs.ca.gov/pcfh/prp/home.html (last visited Nov. 7, 2005).

87. These kinds of collaborative networks and media connections were also observed by Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 36, 78-84, in their study of community prosecution models in four U.S. cities.

88. In explaining the importance of problem-oriented courts generally, Elizabeth Glazer has emphasized: "It's dangerous to say: This is what a social service does and this is what lawyers do. Social service and criminal justice are sort of two halves of the same coin. And if our overall goal is to reduce crime,

prosecutors would not have been able to get the SRVPP off the ground: they had no cases, no referral sources, inadequate understanding of teenage behavior, no services to offer troubled teens,[89] and no workable vocabulary of the harms caused by adult-teen sex. Community leaders from other fields provided those tools and helped to build the foundation of the SRVPP.

This alliance was strengthened and formalized in the summer of 1997, when California's mandatory reporting law was expanded to encompass statutory rape as a form of child abuse.[90] Taking advantage of this tough new reporting law, prosecutors have built working relationships with many outside agencies who qualify as mandatory reporters. According to my survey of California statutory rape prosecutors, more than half of all counties coordinate enforcement with a range of social services agencies, including their family support divisions (74%), welfare service providers (63%), schools (57%), rape crisis centers (57%), and medical service providers (52%). A smaller percentage of counties reported coordination with contraceptive providers (11%) or bilingual

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it's our responsibility to deal with both sides." *See* Feinblatt & Denckla, *supra* note 1, at 211 (internal quotation marks omitted).

89. In turning to community agencies for service provision, SRVPP prosecutors mirror the strategies used by community police officers in New York. *See* MCELROY ET AL., *supra* note 2, at 39.

90. CAL. PENAL CODE § 11165.1(a) (Deering 2005). The law requires medical service providers, clergy, child-protective service workers, welfare case workers, contraceptive providers, school employees, and youth counselors—all professionals who form trusting or confidential relationships with teenagers as part of their jobs—to report known or suspected instances of statutory rape to law enforcement and local prosecutors. While not all possible violations of the statutory rape law are within the mandatory reporting law's purview, the addition of statutory rape to its list of crimes signaled to the community of youth service and medical professionals that they would be expected to work closely with law enforcement to combat statutory rape. Indeed, a professional who fails to report a known or suspected incident that falls within the reporting law's guidelines can be punished criminally herself. The mandatory reporting law thus threatens to make criminals out of those professionals who refuse to participate in the county-wide enforcement campaigns, even if that refusal is motivated by the professional's sincere desire to maintain confidential relationships with teenage clients and is believed to be in the best interests of her clients. *See id.* §§ 11165.7, 11166.

Many mandatory reporters consequently have found themselves in an awkward situation with respect to the issue of client confidentiality: in order to comply with the law they must disclose confidential information they learned while providing important services to minors. For at least some medical and counseling professionals, disclosure under these circumstances is simply an intolerable requirement. According to the Diamond County prosecutor, their noncompliance stems from a difference in ideology: these organizations "don't have the philosophical views of the program." Interview with Prosecutor 1, Diamond County, in Diamond County (October 15, 2001) (on file with author).

centers/other (11%). The strength of these relationships is reflected in the counties' survey responses regarding their most frequent referral sources for statutory rape cases. Various welfare agencies were considered extremely productive sources of new cases: family support divisions, child protective services, and general welfare agencies were identified as among the top five referral sources by 63%, 54%, and 30% of offices, respectively. Schools (46%) and medical service providers (41%) were also mentioned by a substantial minority of counties as fruitful sources of statutory rape referrals.

The remainder of this section explores the variety of ways in which prosecutors have implemented problem-solving approaches in the statutory rape units. I focus first on prosecutors' efforts to conduct outreach with community organizations and then consider their relationships with victims and their families. At the end of this section, I address case handling practices that manifest a commitment to solving the problems embedded in the statutory rape caseload.

A. *Conducting Community Outreach*

To get the message out regarding statutory rape enforcement, the SRVPP has incorporated an outreach component that operates at both the state and county levels. The Governor's Office of Criminal Justice Planning ("OCJP"), the state agency charged with administering and supervising the SRVPP statewide,[91] has published and distributed pamphlets and other props that prosecutors use to make public presentations. It has posted billboards across the state to notify the public that statutory rape is an enforceable crime. Moreover, OCJP encourages county prosecutors to use their annual grant funds for outreach in order to generate referrals of new statutory rape cases. Given the financial support and propaganda provided by OCJP and their own need to make connections within their local communities, prosecutors have invested significant time and effort in building their community outreach networks.

All of the available evidence suggests that these efforts have not been in vain. Most offices report that their outreach programs have generated vast numbers of case referrals and they believe that the community now understands the nature of the harm caused by statutory rape. For example, the prosecutor from Lisle County

91. Since July 2003, the SRVPP has been administered by the Office of Emergency Services as part of a consolidated vertical prosecution program. *See supra* note 33 for more information.

asserts that the "multi-agency infrastructure [her office developed] . . . means that now the adult defendants do not get away with" impregnating minors anymore; she thus emphasizes the direct link between the interagency approach sponsored by the SRVPP and successful prosecutions of crime.[92] Prosecutors also indicate that through the SRVPP they have become integrated into a larger network of professionals who address issues affecting teenagers. The Carlisle County prosecutor explains:

> I think the benefit of my strategy is I get a lot of respect in taking my approach from the multi disciplinary group of people who see me as a valuable resource in fighting the particular harms that we're trying to accomplish. [I'm] not just some . . . prosecutor out to just get convictions and put people in jail. . . . I think society's perception of prosecutors is being kind of like, all you're interested in is your career and putting people in prison. [This] is something that I think is unfair to prosecutors. I think I've been very successful there in getting the multi disciplinary organizations in the county to join in and share with me in addressing these issues. And respecting me for my approach.[93]

This prosecutor voices his frustrations with the stereotype of prosecutors as "just out to get convictions and put people in jail." He contends that by working with a variety of county agencies committed to social services, he has challenged that stereotype and has increased his visibility and credibility within the community.[94]

These same virtues have been acknowledged by community or problem-oriented police officers, who indicate that building bridges with other sections of the community has generated both law enforcement and symbolic benefits. Community police officers can develop information networks that provide reliable tips about on-going criminality and improve the chances of witness cooperation in prosecutions. Moreover, increased police visibility and responsiveness toward community issues can inspire reciprocal good

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92. Interview with Prosecutor 1, Lisle County, in Lisle County (Jan. 8, 2002) (on file with author). A similar view was expressed by the prosecutor from Craven County: "There is a lot of outreach in the community for the purpose of referrals, but, in the process of getting referrals, we have been able to educate potential victims, victims, educators, [and] medical providers as to what the [crime] is." Interview with Prosecutor 1, Craven County, in Craven County (Nov. 20, 2001) (on file with author).

93. Interview with Prosecutor 1, Carlisle County, *supra* note 37.

94. Working out in the community, attending neighborhood meetings, and speaking at schools were cited as new roles for the prosecutors studied by Coles and Kelling, as well. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 53.

feelings about the police in otherwise alienated segments of the community.[95]

In addition to providing these case- or community-oriented benefits, outreach allows the prosecutor to step outside of his role as a courtroom actor and to address teens on larger issues.

> You could either talk about sex as prevention, or you could talk about the consequences of the sexual acts, or you could talk about education and this is what you are dealing with and what happens if you have sex and you are underage. There are consequences not only from pregnancies but from the criminal realm and the social stigma.[96]

> [T]o the extent that you can, through outreach efforts in addition to prosecution, maybe plant some seeds in terms of the idea of having sex at that age or at least taking some precautions to prevent pregnancy, maybe you'll prevent some of those situations that aren't, that we perceive aren't good for young women in terms of pregnancy, economic ability, etc.[97]

These prosecutors take full advantage of the public platform (and captive audiences) that outreach opportunities provide. They do not limit their presentations to legal issues or to criminal justice treatment of statutory rape but also "plant some seeds" in the minds of adolescents regarding the consequences of early sexual activity. The Macon County prosecutors are even more proactive; their school programs include not only general awareness training but also the provision of interactive dolls to female adolescents to teach them the supreme responsibility of caring for a child.[98] In other counties,

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95. MCELROY ET AL., *supra* note 2, at 37-38; *see also* Coles & Kelling, *Emergent Strategies*, *supra* notes 9, 47-48, 58 (reporting that prosecutors stationed in community offices frequently identified the benefits of their closer connections to the public).

96. Interview with Prosecutor 3, Randall County, in Randall County (Jan. 10, 2002) (on file with author).

97. Interview with Prosecutor 1, Jacoby County, in Jacoby County (Dec. 19, 2001) (on file with author).

98. Interview with Prosecutor 1, Macon County, in Macon County (Oct. 17, 2001) (on file with author). The Macon County prosecutor continued:

> [W]e were able to get some of those fake babies that actually weigh as much as a baby, cry like a baby and that kind of stuff. And . . . we made them available for schools. And that was something that again . . . has nothing to do with the prosecution of the case but it really brings home to these teenage girls what type of responsibility we're talking about. When they think a baby is cute and fun, these were not cute or fun.

prosecutors use the statutory rape enforcement program to advocate a sexual-abstinence agenda to the local teen communities:

> We not only need to reduce further teen pregnancy but we need to also educate them on the reasons why, and what other consequences can occur because of sex when you're a teenager. And that includes a whole list of, the same things they cover in sex education but with a liberal slant. It sounds like I'm some conservative zealot but let's face it, I went through high school, I'm friends with a lot of teenage boys [in the community] . . . [s]o I know exactly what they're teaching in sex education classes because they tell me. And it has a liberal slant. . . . It's okay to participate, blah, blah . . . and I think we're missing the boat.
>
> . . . .
>
> I'd prefer if they don't engage in sex pre-marriage period. So I am one of those abstinence supporters versus "let's teach them to use condoms, etc."[99]

The Diamond County prosecutor quoted above personally supports zero tolerance with respect to premarital sex, and feels it is his place to counter the harm-reduction approach to sex education he believes dominates in the local schools. He uses his contact with local teenage boys in the community to explain his knowledge of what is being taught in sex education classes, and his role as a prosecutor to establish himself as an authority on what principles should be taught instead.[100]

The school programs demonstrate just how far the SRVPP prosecutor has moved from her traditional role as courtroom advocate. Talking to teens about sex, promoting abstinence, and offering warnings about the social stigma of teen motherhood, let alone supplying dolls for motherhood practice—all of these actions far exceed the steps usually considered necessary for effective prosecution of criminals. They signify that prosecutors are taking the new prosecution, problem-oriented approach seriously; they define their goals not just in terms of case processing, but more

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Id.

99. Interview with Prosecutor 1, Diamond County, *supra* note 90.

100. This prosecutor might unknowingly be taking the advice of the Indianapolis District Attorney, who opined that prosecutors ought to use "more of our talents and our authority" to make changes in the community. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 44. To the extent a prosecutor regards himself (or herself) as the moral compass of the community, he (or she) is likely to consider this use of authority appropriate.

broadly in terms of community education, awareness, and deterrence measures.[101] By expanding their job descriptions beyond the usual criminal justice concerns to address underlying problems in the community, California SRVPP prosecutors strongly resemble the problem-oriented police officers studied by police scholars.[102]

B. *Counseling Victims and Their Families*

While many traditional prosecutors attempt to build rapport with crime victims,[103] SRVPP prosecutors spend an extraordinary amount of time on this function and go well beyond the case-preparation stage of involvement with their victims. They not only advise victims about the court process and proper witness behavior but also counsel them on issues relating to self-esteem, appropriate sexual and school behavior, and life choices. My interviewees reveal mixed motives in this regard; they want to build a strong case for court but they also strive to help the victim mature, to teach her to stand up for herself, or to show her opportunities that she may be squandering:

> Has anyone ever told them to say "No!" to sex? No, it is no big deal. It is just sex. I tell them it is the same thing as drugs. You have to say no. Learn to say no.[104]

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101. Prosecutors' cultivation of collaborative relationships and community outreach ties has remained strong though the programmatic purpose of the SRVPP has evolved from countering teen pregnancy to countering sexual exploitation of teens by adults. *See supra* note 41. This shift occurred in the late 1990s in order to broaden the populations served by the SRVPP, to defuse political opposition to the welfarist agenda, and to make the program palatable to California's newly elected Democratic governor. For more information about the reasons behind this shift, see Levine, *supra* note 5, at 138-45.

102. *See, e.g.*, GOLDSTEIN, POLICING, *supra* note 49; MCELROY ET AL., *supra* note 2. They also resemble some of the problem-oriented prosecutors studied by Coles and Kelling. *See* Coles & Kelling, *Emergent Strategies*, *supra* note 9.

103. Victim relationships are particularly valuable for prosecutors assigned to vertical units that handle sensitive crimes, like sexual assault, child abuse, and domestic violence. However, my research reveals that the SRVPP prosecutor's contact and relationship with her victims goes beyond even the conventional vertical unit prosecutor's experience, as statutory rape victims and their families often receive (unsolicited) instruction in the meaning of victimization, proper behavior, and parenting skills. The following pages describe this process in detail.

104. Interview with Prosecutor 1, Sapphire County, in Sapphire County (Nov. 15, 2001) (on file with author).

> [Y]ou are teaching them to value one aspect of themselves. Basically their sexuality or to use that to trade for drugs or alcohol to get something they want instead of respecting themselves in a relationship where someone else is respecting them.[105]

> [P]art of our goal is . . . getting these girls and boys, but mostly girls, getting them directed toward not getting pregnant, going to college or whatever, getting vocational training. You know, working toward a life where they can be educated, self-sufficient, and all that.[106]

These prosecutors feel obligated to help statutory rape victims avoid falling into a cycle of victimization. To live up to this obligation, a good SRVPP prosecutor needs to teach teenagers not just "how to say no to sex," but also "how to value themselves," "get vocational training," and cultivate other life skills that will foster self-sufficiency and stability. The topics covered in prosecutor-victim sessions are not limited to intangible issues like self-esteem, goals, and maturity. In some counties, the prosecutor's office will help pregnant and parenting victims to secure financial assistance, to get prenatal care, and to find literature addressing the choices a pregnant woman must face regarding the future of her pregnancy.[107] Other prosecutors buy toys for the victims and occasionally take them out to dinner as a way to build a trusting relationship.[108] Moreover, some female prosecutors perceive themselves as positive role models for the statutory rape victims, as they feel uniquely suited to demonstrate the advantages of life beyond high school:

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105. Interview with Prosecutor 1, Emmanuel County, in Emmanuel County (Jan. 15, 2002) (on file with author). A similar view was expressed by the prosecutor from Macon County:

> [I would do] anything I could [to] help with them setting up after school programs, anything I could [to] help those kinds of things to raise self-esteem and to give these gals some idea there was something, when you're out there and you're sixteen and the best thing you have going for you are your boobs, that's it, that's where you're headed. . . . I would like her to get interested in social things, I'd like her to get involved in things besides sitting at home and waiting for some guy to come by.

Interview with Prosecutor 1, Macon County, *supra* note 98.

106. Interview with Prosecutor 1, Carlisle County, *supra* note 37.

107. This type of help is often given with the assistance of a victim/witness advocate; see *infra* Part VI.C for more information about advocates and their relationship to prosecutors.

108. Interview with Prosecutor 2, Violet County, in Violet County (Dec. 14, 2001) (on file with author).

> I always thought that I was kind of "what they could be if they could get their life together"—[they could] have a job, could be successful on their own and do their own thing, especially as a single woman. . . . I always felt like I didn't have the place to judge them . . . but I did spend a lot of time just talking about options. . . . [It was] really limited exposure and you hope something takes.[109]

This Randall County prosecutor hopes that she can teach by example; as a single woman with a solid career, she signifies that adult success and happiness are possible without a male partner. She thus draws on her own life to make connections with her young victims, to promote the value of independence, and to show teens that they have options besides early pregnancy and dead-end jobs.

In some counties, these office counseling sessions include not only the victim but also his or her family. Prosecutors who take this approach feel it is their responsibility to help the victim's family keep their child on track and to teach the victim to have respect for parents and authority.[110]

> You are not just helping the kid; you are usually helping the parents to help the kid. I have had parents go, "Thank you so much for telling her [not] to talk back to me!" . . . [I]t is kind of funny that you are coming in as this third person with an objective and saying, "There needs to be certain decorum and certain respect." I even yelled at one kid, "Sit your ass down and you are not going to talk back to your parents in front of me!"[111]

In acting to "help the parents help the kid" to be more respectful and more conscientious, this prosecutor's objective is decidedly non-

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109. Interview with Prosecutor 2, Randall County, in Randall County (Jan. 10, 2002) (on file with author).

110. Playing mediator between family members is not a particularly comfortable role. One prosecutor mentioned that she reluctantly became involved in an intrafamily dispute over the victim's ability to care for her newborn; the victim's mother tried to enlist the prosecutor's support in gaining custody of her granddaughter because she felt her own daughter was doing a miserable job as a mother. *See* Interview with Prosecutor 1, Cherokee County, in Cherokee County (Jan. 8, 2002) (on file with author). Another mentioned that she was almost drawn into a custody dispute between the victim's parents, each of whom blamed the other for their daughter's transgressions. *See* Interview with Prosecutor 1, Standard County, in Standard County (Dec. 4, 2001) (on file with author). This aspect of the SRVPP job is considered more fully in the following pages.

111. Interview with Prosecutor 2, Ruby County, in Ruby County (Nov. 19, 2001) (on file with author).

criminal justice oriented. She wants to ensure that both the victim and the family will pull themselves out of a spiral of poverty, deviance, or frustration: "[Y]ou hope that this kid and that family will move on to a better place and we won't see him again."[112]

Some prosecutors who work extensively with families strive to make sure that the teen victims complete their education (at least through high school). Others have more traditional deterrence goals based on their understanding of the cycle of abuse within families:

> First you see the parents come through with [domestic violence] and then the child's a witness . . . then the child comes through [as a victim of statutory rape]. We are a small county so you know. [The] child comes back and is a victim of abuse themselves. Then the child comes back and . . . is perpetrating. Oh, we did a great job with that family, didn't we? . . . We need to really be working with them and to get these problems solved at the front end so that we don't keep coming back, as it is tragic and you feel like the whole system has just failed these kids.[113]

This prosecutor feels compelled to help kids and families as a way to prevent future violence. She draws on her past experience with abuse cases to argue that victims are likely to become perpetrators if the system does not intervene to teach proper behavior and coping strategies. The new prosecution's problem orientation thus may be attractive to some prosecutors because it gives them the ability to address root causes of crime within the context of the community itself. Unlike the traditional prosecutor's case focus, the new prosecution does not instruct the prosecutor simply to clean up the mess once the rules have been broken; it encourages her to envision and implement lasting changes that will prevent future problems.

Other prosecutors retain a strong focus on individual (or family) responsibility for law violations. According to this view, deterrence of future misconduct or harm depends on the prosecutor's understanding of who will ultimately be responsible for the teen's future behavior: "Sometimes it is a matter of making otherwise very responsible parents aware of something that their kid was pulling off under their noses. Sometimes it is a matter of taking parents aside and educating them—YOU need to be more on top of this. Your teenager is at-risk here."[114]

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112. *Id.*

113. Interview with Prosecutor 1, Emmanuel County, *supra* note 105.

114. Interview with Prosecutor 1, Franks County, in Franks County (Oct. 29, 2001) (on file with author).

The Franks County prosecutor highlights the role of the parents in producing their children's deviancy or vulnerability to attack. By telling parents that they "need to be more on top of this," he criticizes them for their past negligence and urges them to pay closer attention to their children in the future. He educates parents to discourage risk-taking behaviors in their children and to prevent others from taking unfair advantage of what he regards as their lax parenting style.

In sum, SRVPP prosecutors devote themselves to counseling victims and their families, a task most believe produces tangible benefits. Building a solid relationship with the victim can help the prosecutor to strengthen his understanding of the case, which enhances his ability to manage it in court. Additionally, prosecutors use these counseling opportunities to promote safer, more "responsible" lifestyles among teens and their parents in an effort to better the teens' chances for a successful future.

C. *Handling Cases and Tailoring Dispositions*

The problem-solving approach is also manifest in most aspects of prosecutors' case handling, including the decisions they make about how to treat the defendant. Statutory rape prosecutors commonly conduct extensive pre-filing investigations to learn as much as they can about all parties involved in a case (victim, victim's family, defendant, defendant's family, friends, teachers, etc.).[115] They do not limit their investigation to the facts of the crime itself, an approach usually considered a luxury in overworked and understaffed district attorneys' offices. In statutory rape cases, though, being well-informed about the nature of the relationships at issue, not just about the case, allows the prosecutor to identify at the earliest possible stage the desired case outcome (in terms of custody length and location, stay away orders, counseling, classes, etc.) and then to file and prosecute the case in order to achieve this outcome.[116] Prosecutors work in conjunction with probation officers,

115. For an extensive treatment of prosecutorial discretion and filing practices in statutory rape cases, see Levine, *supra* note 5, at 208-73; Kay L. Levine, *The Intimacy Discount: Prosecutorial Constructions of Intimacy in Statutory Rape Cases* (forthcoming 2006) (working paper, on file with author).

116. This broad approach to data collection resembles one of the core components of problem-oriented policing, which instructs police to gather information about more than just the perpetrator in order to fully understand the crime. GOLDSTEIN, POLICING, *supra* note 49. Casting a wide net is also characteristic of problem-oriented courts and community-based defender services. *See* Berman & Feinblatt, *supra* note 63, at 126 (courts); NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, *supra* note 70 (defense services).

psychologists, and community agencies that offer counseling and education for persons with anger or sexual issues to tailor a defendant's probation terms to match (what they perceive as) his needs, the victim's needs, and the community's needs.[117]

> When you take a look at these cases we actually try and look at them like, OK, *this isn't the type of case where I have to put on all my armor and go after somebody* . . . I think these cases are looked at as something where you can actually bring some people together and work something out. . . .
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> . . . .
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> Where you have a defendant and victim who are clearly a unit as you prosecute him normally with the emotional support and oft times financial support of both of their families, where essentially you would be open to ideas that you are going to have a responsible marriage family unit coming out of this. . . . [W]*hat you would do is create a set of circumstances to create both the carrot and the stick to get those people to that point of the best family situations and best financial responsible situations and most involved emotional support situation*—all of those factors—and you give everybody incentive to make it happen and that incentive is fine.[118]

In the above quote, the Franks County prosecutor confirms that different types of criminals call for different types of responses from his office. For low-level offenders, he doesn't need to "put on all [his] armor;" he can instead work out a case resolution that uses both "the carrot and the stick" to get the defendant and the victim into the most "responsible" family and financial situations possible. Where presumably both the defendant and the victim want a future

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Note also that the statutory rape prosecutors often carry smaller caseloads than traditional prosecutors, which allows them to delve more deeply into each case.

117. There is one important divergence here from the traditional problem-solving perspective. While statutory rape defendants may receive personalized probation terms, they are subjected to no more supervision or monitoring by the courts than regular (non-problem-solving court) criminal defendants. Statutory rape cases are generally handled by the regular superior court judges; there is no special courtroom or specially-appointed judge for this caseload. And unlike drug court or domestic violence court defendants, statutory rape defendants are not required to return to court regularly for drug testing or progress reports. *See* Berman & Feinblatt, *supra* note 63, at 131 (describing problem-oriented courts handling of narcotics or domestic violence offenders).

118. Interview with Prosecutor 1, Franks County, *supra* note 114 (emphasis added).

together, the prosecutor sees himself as facilitating that result while still protecting the financial interest of the victim and of the state.

The Franks County prosecutor is not alone in tailoring specific probation terms to channel the defendant into a more "responsible" lifestyle. Many prosecutors reference the inclusion of paternity testing, child support orders, or general compliance with family court orders as a key component of probation following conviction when the victim is pregnant and plans to carry to term or is already parenting. Lisle County has a particularly well-developed policy:

> We inform [the victim] that she has to submit to a blood test for DNA purposes. Then when the baby is born the baby has to submit to a test also and as well as the defendant. We actually file a Blood Order which means that the defendant is ordered to supply a blood sample for DNA purposes and that is filed at the time of arraignment. At the time of sentencing . . . he will then be ordered to pay child support through Child Support Services (CSS). The judge will actually state that on the record and then the victim will be given a minute order or a copy to take to CSS whereby they will follow up to make sure that he will actually pay child support and this will be a monthly installment plan and according to his income.[119]

By requiring all pregnant and parenting statutory rape victims to assist in the establishment of the defendant's paternity, the Lisle County prosecutor's office assumes jurisdiction over three bodies—the victim, the defendant, and the baby—in order to further its child support collection agenda.[120]

Establishment of paternity is only the beginning; probation can also include rehabilitation and custody provisions. For example, prosecutors typically require a defendant who has fathered a child with his statutory rape victim to attend some type of counseling or educational sessions to ensure that he will eventually become "responsible" in his future relationships.[121] Some prosecutors even

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119. Interview with Prosecutor 1, Lisle County, *supra* note 92.

120. While I did not specifically question this prosecutor about victim noncompliance with her office policy, it seems reasonable to infer that the victim has no authority to decline to participate. The collection of child support from the baby's father is a priority of the State of California, even if the victim wants to forfeit her rights to collect from the father.

121. Consider this quote from Prosecutor 1, Macon County, *supra* note 98: "We've had things where we've required people to go to parenting classes; we've had things just so he could see what it's like to be a parent. . . . [W]e've sent them to drug classes, we've tried to kind of tailor some things for it to keep them away from kids."

aim to use probation conditions to better the chances of a successful marriage between the defendant and the victim:[122] "A lot of those cases part of [what I require] is actually taking marriage counseling, domestic violence type of courses so that I can make sure that the marriage is going to be okay."[123]

Custody poses a more complicated issue. While some prosecutors opine that some incarceration is necessary to demonstrate the seriousness of the crime to the defendant, the victim, and the community,[124] many prosecutors recognize that lengthy periods of incarceration are inconsistent with the real goals of the SRVPP unit: fostering the defendant's financial responsibility and lessening the state's welfare burden.

> [W]e want this guy out there working to be a productive citizen so he can take care of his child that he brought into this world and if you put him in prison, and that means as taxpayers we are paying for him to be in prison and as taxpayers now we are paying for his kid, and probably paying for the little girl [victim] who is on welfare. That is more of a social ill and I don't think that is the kind of resolution that we are really looking for.[125]

Probation can also be used to regulate the sexual behavior of the defendant and his contact with the under-eighteen population. Prosecutors commonly insist that the court order the defendant to stay away from the victim during the probation period,[126] and some

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A similar view was expressed by another prosecutor: "I'll often tell them this is a way to keep him motivated. Get him on probation and make him submit to tests and not drink and not take drugs and meet his obligations." Interview with Prosecutor 1, Emmanuel County, *supra* note 105.

122. In the early-to-mid-1990s, certain social workers in one southern California county allowed defendants to marry victims in return for a promise not to forward their files on to the county prosecutor's office. *See* Ayres, *supra* note 13; Matt Lait, *O.C. Agency Alters Policy on Underage Marriages*, L.A. TIMES, Jan. 24, 1997, at A1. This practice no longer exists.

123. Interview with Prosecutor 1, Standard County, *supra* note 110.

124. *See, e.g.*, Interview with Prosecutor 1, Diamond County, *supra* note 90 (indicating that he seeks state prison commitments for most of his felony defendants).

125. Interview with Prosecutor 2, Ruby County, *supra* note 111. Given this focus on collecting child support, the criminal justice system's excessive involvement in statutory rape might have diluted the perception that having sex with minors is actually a crime—if all prosecutors want is to get the defendant to pay child support, if incarceration is not regarded as a proper form of punishment, statutory rape begins to look like non-criminal behavior. I explore the extent to which prosecutors use different kinds of sanctions in different kinds of cases in another article. *See* Levine, *supra* note 115.

126. Where the victim is raising the defendant's child, this no contact

courts order the defendant to stay away from minors altogether during this time. The Diamond County prosecutor takes this one step further: he has required defendants to refrain from sexual contact with the victim until she reaches eighteen or marries him, a term that includes "open mouth kissing."[127] In one particular case, the prosecutor did not want the victim and the defendant "engaging in any type of petting that would encourage additional sexual contact," and he warned that "if we found out about it, we would enforce the order and he could do up to a year in the county jail."[128]

The purest form of problem-oriented prosecution would contemplate alternatives to the filing of a criminal case or to the use of court sanctions.[129] It would first identify the nature of the problem at issue in the relationship and then consider how best to *solve the problem*, whether that solution involved job training for the teen or the adult, self-esteem training for the teen or the adult, parenting classes, free contraception, incarceration, or some combination of these programs. But the evidence indicates that SRVPP prosecutors are reluctant to take the problem-oriented approach to this level. Despite both the state and local emphasis on outreach and counseling, the prosecutor's function in the SRVPP unit remains focused on case handling. Defendants and victims who come to the attention of the SRVPP prosecutor can only be "helped" within the context of a filed criminal case. Hence, the probation program provides a mechanism for prosecutors to "play[] social workers to some degree with the[se] guys"[130] and offers some tangible "[e]ncourage[ment for] the father to have an active role in

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requirement can conflict with the prosecutor's goal of transforming the defendant into an involved father.

127. Interview with Prosecutor 1, Diamond County, *supra* note 90.

128. *Id.* It is unclear whether this probation term is meant to protect the victim or to further the state's interest in keeping this defendant from producing any more welfare babies.

129. The problem-oriented prosecutors' offices in both Austin, Texas and Kansas City, Missouri provide a wide range of alternatives to prosecution, including diversion for nonviolent youthful offenders. *See* Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 72. The community prosecutors in Boston run a "Johns Project" for those arrested in prostitution busts; this form of diversion provides for AIDS education and community service for three months instead of full prosecution. *Id.* at 73.

130. Interview with Prosecutor 1, Carlisle County, *supra* note 37. Certainly victims who pursue prosecution may get access to social services that otherwise would not be available, and certainly some prosecutors may file charges to assist victims in this way. The prosecutors' tendency to subject the defendants to social work practices is considerably more troubling.

the child's life."[131] It allows the court to supervise the defendant's sexual behavior and also establishes a structure for the defendant to take care of any financial obligations he may owe to the victim and/or to his child, which in turn curtails the government's obligations to the victim. Without an established criminal case, there is no structure by which the courts or the prosecutor can track the defendant's actions or mandate behavioral changes.

The most developed form of the problem-oriented, rehabilitative approach is found in the few counties that extensively employ diversion (or deferred entry of judgment) programs for statutory rape offenders.[132] A defendant who successfully completes the requirements of his diversion program—parenting classes, counseling, and the like—will have his case dismissed and his record cleared for all purposes. A county that offers the chance of dismissal for successful divertees acknowledges the salience of two of the factors that inspired the implementation of problem-solving courts: overcrowding in the state's jails and prisons and the availability of solid therapeutic alternatives to criminal punishment.[133] While most counties extensively rely on post-conviction probation to impose therapeutic responses in addition to criminal sanctions, the relative handful of diversion-friendly counties believe that successful therapy is often an adequate and well-suited *replacement* for criminal penalties, given the consensual nature of the crime in many cases.

> I would hope that by the time these guys get out of this twenty week program they would have learned why they need to stay away from minors and [find a real] woman to have sex with; they need to do that. And . . . I have an extra hope built-in that, since it is a life skill course, they will walk out of there with some skills that might change their life and put them in a

131. Interview with Prosecutor 1, Inman County, in Inman County (Jan. 9, 2002) (on file with author).

132. The term "diversion" signifies that a criminal case is continued, without plea, for a period during which the defendant takes classes, receives counseling, etc. If the defendant successfully completes the requirements of his diversion program, the case will be dismissed. "Deferred entry of judgment" requires the defendant to plead guilty first; the court then continues his sentencing for the rehabilitative period. If he successfully completes the requirements of his program, the court will allow him to withdraw his guilty plea and will dismiss the case. While no county had implemented a standard diversion program for statutory rape defendants (rehabilitative models, where they existed, all took the deferred entry of judgment form), in this Article I use the term "diversion" for ease of reference.

133. *See* Berman & Feinblatt, *supra* note 63, at 128; Butts, *supra* note 64, at 121.

different job or maybe give them goals for the first time in their lives.[134]

The Emerald County prosecutor quoted here believes that young adults[135] who become sexually involved with minors fundamentally lack good judgment and that counseling and skills workshops will teach them how to make better decisions in the future. Her county's program aims to provide broadly applicable life skills, not just anticrime messages, as a way to inspire young men to lead more successful lives. Moreover, because even a minor criminal record will hinder an otherwise solid person in job searches and housing applications, this prosecutor considers a criminal conviction an unnecessary and counterproductive obstacle for many youthful offenders.

Most county prosecutors, however, regard diversion as an unacceptable alternative in statutory rape cases. I was told repeatedly that SRVPP units (individually and collectively) need to send a strong message to offenders, victims, and the public, and that diversion programs undermine that message by allowing offenders to escape with no punishment and no criminal record. The prosecutor from Standard County asserts that with diversion "you're sending a message that these cases aren't valuable" by signaling that they do not merit real intervention.[136] I found that most SRVPP prosecutors were not simply neutral or lukewarm about diversion; they were strongly opposed to creating dispositions that did not include at least some measure of criminal justice punishment to underscore the criminality of the defendant's behavior. Consider this exchange I had with the Cobb County prosecutor:

KL: Do you think there is any place for deferred entry [of] judgment in [statutory rape cases]?

DA: No, because in general I don't think deferred judgment works!

134. Interview with Prosecutor 1, Emerald County, in Emerald County (Oct. 25, 2001) (on file with author).

135. In Emerald County, a defendant must be under twenty-five and have no prior convictions for serious offenses in order to qualify for this program. Moreover, diversion is not available for defendants whose conduct resembles a forcible sex crime in any way.

136. Interview with Prosecutor 1, Standard County, *supra* note 110. Presumably this prosecutor's definition of "value" encompasses either (or both) harm to the victim and impact on state resources.

KL: Works to do what?

DA: Well, I think we have seen how it only half works in other things and I think in these kind[s] of cases, it wouldn't. I just know; I don't know what you [would] do. As long as you don't get involved with another teenager for a year or something? . . . I think you have too many other factors and I can't see how it would work. . . .[137]

The Macon County prosecutor expresses a similar concern about efficacy: "I don't like doing [diversion dispositions] because I don't like [the case] not being completed. I like [the case] being done and sent on down the line and whatever you're going to do you're going to do. That's the problem with diversion, it's just not done. . . ."[138]

The Diamond County prosecutor is even more direct:

I'd kick somebody out of my office if they wanted to use diversion. . . . How can you have a diversion? Diversion usually suggests that you're going to educate the defendant. You're not going to educate this guy from [having] sex again. He's going to go out there and have sex again, and he's going to think, "they're not going to catch me," and then you've got nothing. You've got no teeth. . . . If you want to waste your time on diversion, don't even bother filing a case. I mean that's the way I feel.[139]

Although the diversion alternative seems to comport with the spirit of problem-oriented approaches to criminal justice issues, its lack of criminal justice consequences for guilty offenders makes it unpalatable for prosecutors whose education and training inspire a law enforcement and deterrence focus. Many prosecutors are openly skeptical of any rehabilitation program's ability to educate defendants about the wrongfulness of inappropriate sexual relationships; they believe that future compliance with the law depends almost entirely on the reciprocal risks and obligations created by post-conviction probation. The Morris County prosecutor sums it up as follows: "I think [the defendants] should be held accountable and it should stick on their record so that they don't do it again. . . ."[140] The hostility toward the use of diversion suggests that there may be some deep-seated ambivalence among SRVPP

137. Interview with Prosecutor 1, Cobb County, in Cobb County (Nov. 16, 2001) (on file with author).

138. Interview with Prosecutor 1, Macon County, *supra* note 98.

139. Interview with Prosecutor 1, Diamond County, *supra* note 90.

140. Interview with Prosecutor 1, Morris County, in Morris County (Oct. 23, 2001) (on file with author).

prosecutors about the degree to which they should serve non-traditional objectives in this job. That ambivalence is considered below.

V. PROBLEMS WITH THE NEW PROSECUTION

On the surface, the new prosecution's problem-oriented approach seems to have taken hold in district attorneys' offices across California. Prosecutors in the SRVPP units go beyond their case files and spend hours each week conducting outreach, making presentations at schools, manning booths at county fairs, meeting with community groups, and conferencing with medical providers. These outreach sessions extend well past the criminal nature of statutory rape, as prosecutors also encourage dialogue concerning abstinence education and the best ways to address the needs of the teen population. Additionally, much of the prosecutors' time in the office is devoted to victim services, counseling victims and their families to help them get back on track and to take advantage of available resources. Finally, prosecutors strive to tailor case dispositions to the (perceived) needs of both the defendant and the victim—paternity testing, child support, marriage counseling, drug counseling—to foster responsibility in the defendant's lifestyle. These are not merely peripheral aspects of the SRVPP prosecutor's job; they are integral components of caseload management, and most prosecutors feel that the outreach and counseling services supplement courtroom advocacy in important ways.

However, if we look below the surface, the new prosecution has not been embraced warmly or uniformly by the population charged with implementing it. The new prosecution's problem orientation represents a major reorganization of prosecutorial priorities and resources. Yet the rhetoric of the new prosecution, in terms of its mission and objectives, often contradicts the workstyle, resources, and values of the persons expected to make good on its promises. Consequently, it has encountered significant resistance from prosecutors on a number of fronts.

A. Drawing Boundaries Based on Interest, Skill, and Time

Many prosecutors express ambivalence—or even downright hostility—about having to fulfill the problem-solver role themselves. Their ambivalence or hostility toward the non-advocacy components of the job takes a variety of forms. The first is lack interest or skill: some prosecutors explicitly deny any interest in handling the non-advocacy or social work components of the job, and many express

concern that they have not been trained for this type of work.[141] "[A] lot of people don't like the community outreach. They went to law school; they didn't go to public speaking school."[142]

> Respect and responsibility with regard to those girls is not our job; prosecuting the crime is our job. . . . We said from the beginning I am not a social worker and so in the sense that we would try to point out as much as you could in an interview of an hour or two that maybe there are some other things you should be concerned about in your life. No, we weren't about to be doing counseling.[143]

> One thing I have to be very careful about is that I am not a social worker, and I'm not a psychologist nor a psychiatrist. We try to help to the extent we can, but I cannot as a prosecutor square away all the family problems these people have. They come from very dysfunctional families, many of them do. . . . And I don't have the time or the skills or the wherewithal to deal with those kinds of issues. . . .[144]

Prosecutors try to draw clear outlines of their job descriptions, and social work or psychological counseling falls outside of those boundaries. Many lack the training and the commitment to perform well in non-advocacy settings, and they are concerned about doing real harm in the context of counseling victims or getting involved in messy family situations.[145] Consider this problem faced by a prosecutor in Cherokee County:

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141. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 46 (reporting that prosecutors who were given problem-solving assignments feared they lacked the qualifications or knowledge to do the job well). While I have not empirically tested the relationship between expressed lack of interest in social work and passion for tackling the root causes of crime, these two variables may be inversely correlated.

There is another aspect of the job, besides social work, that many prosecutors feel ill-equipped to handle. Several of my interviewees mentioned their frustrations with the recordkeeping requirements of the SRVPP job; one emphatically declared that he was "a prosecutor, . . . not an accountant and [couldn't] keep track of all that stuff. . . ." Interview with Prosecutor 1, Onyx County, in Onyx County (Dec. 26, 2001) (on file with author).

142. Interview with Prosecutor 1, Sapphire County, *supra* note 104.

143. Interview with Prosecutor 1, Randall County, in Randall County (Jan. 10, 2002) (on file with author).

144. Interview with Prosecutor 1, Emerald County, *supra* note 134.

145. Interview with Prosecutor 1, Violet County, in Violet County (Dec. 14, 2001) (on file with author).

> The mother is at odds with what to do with her teenage daughter because the teenage daughter wants to take her newborn infant and go out partying with her friends. . . . [S]o the mother is calling me and asking, "What do I do with her?" This is where there is a void, I think, and I don't know if it is with the [SRVPP grant], but with our criminal justice system and my role as a prosecutor. I can't then go assist her in getting custody orders or temporary guardianship of that baby. . . . But in the background in this conversation I could hear the victim screaming at me saying, "DA, I hate you! This is all your fault!"[146]

Because many statutory rape cases involve intrafamilial tensions between parents and children, prosecutors may find themselves placed in a double-bind: they feel compelled to protect teenage victims but also want to help family members provide for each other. When these goals conflict and a disgruntled family member seeks the prosecutor's assistance, the prosecutor may become frustrated by her personal inability and by the system's inability to respond in helpful ways. Despite their official jurisdiction over the statutory rape caseload, the prosecutor's office and the criminal justice system are not the appropriate institutions to mend family disputes.

Beyond simply feeling unqualified to fulfill the social worker role, many prosecutors resent the intrusion on their time that outreach and counseling requires. Although the SRVPP was designed to coordinate the efforts of district attorneys and other county agencies that address these types of issues, prosecutors often find themselves holding the bag.[147] Yet criminal attorneys prioritize court time and case-preparation time; investigation and advocacy are the jobs for which they feel well trained, well suited, and respected. These advocacy roles not only are considered important

146. Interview with Prosecutor 1, Cherokee County, *supra* note 110.

147. Some of my interviewees speculated that this allocation of work stemmed directly from the funding strategy of the SRVPP grant; because the prosecutor's office is the only grant applicant and the only grant recipient, it may be the only local agency with funds to provide these services. For a contrary account of the benefits of allowing the DAs office to control the purse strings, see Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 28-29 (describing the Kansas City District Attorney). Aside from the finances, agencies can be differentiated by their organizational structures, agendas and habits, and their employees may report to a set of politicians and bureaucrats with divergent priorities from those of the district attorneys' office. For a similar problem in the problem-oriented policing context, see SKOGAN ET AL., *supra* note 51, at 26-27.

and prestigious, but they are also the basis on which prosecutors evaluate each other's skills and potential for promotion within the office. Extensive counseling sessions with victims and community presentations,[148] because they co-opt the prosecutor's courtroom and investigation schedules, are considered unworthy uses of a prosecutor's time.[149] The Sapphire County prosecutor explains this dilemma:

> They want to be in the courtroom, and they really don't want to do the presentations, and that is probably 50% of it, doing the outreach. . . . It takes a lot of juggling in that respect. If you didn't have the outreach [as a] requirement, it wouldn't get done because prosecutors want to be in court and they want to try cases.[150]

Taking on the social work components of the SRVPP job thus requires prosecutors to extend themselves in uncomfortable ways, to devote time and energy to developing non-advocacy skills that other prosecutors do not admire. Yet prosecutors reveal that this allocation of personal and professional resources might do more than simply yield little professional reward; it risks causing real harm—both to the victim and his family (in the event the prosecutor offers bad advice or improperly involves himself in a nasty family dispute) and to the prosecutor's reputation, as time spent on social work activities reduces the amount of time one can devote to honing courtroom skills.

B. Managing Difficult Victims

Looking beyond these boundary maintenance issues, prosecutors also point to the difficulty of dealing with statutory rape

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148. One prosecutor referred to the school presentations as "dog and pony shows." *See* Interview with Prosecutor 1, Fulton County, *supra* note 38.

149. Similar issues have been raised in the context of community, problem-oriented policing, as community officers feel they need to justify to patrolmen why time spent at a neighborhood meeting, rather than monitoring the radio for 911 calls, is time well spent. *See generally* MCELROY ET AL., *supra* note 2, at 30-34.

150. Interview with Prosecutor 1, Sapphire County, *supra* note 104. The prosecutor from Inman County also despaired at the amount of time required to build community relationships:

> [I]t is very time-consuming in terms of dealing with the Health Department and various agencies, that normally if you are a general prosecutor you don't have to deal with. . . . [If you deal with] victims' rights groups . . . or other groups that are there to help victims[,] you are going to a meeting almost every night of the week and every day during lunch almost because there are so many different groups. . . .

Interview with Prosecutor 1, Inman County, *supra* note 131.

victims and their families. While many prosecutors enjoy working with victims generally, a common theme among the SRVPP prosecutors was frustration: they find it frustrating to talk with adolescents, to get them to attend office meetings or court hearings, and to show even minimal levels of respect. Moreover, they are acutely aware that teenagers do not make good witnesses and do not have much jury appeal. One prosecutor remarked, "I think the general public—they didn't really give teenagers much credibility—that is the first thing. The second thing is that teenagers understandably sometimes are not completely truthful and they sometimes either exaggerate or understate the situation so it makes it really difficult to deal with them."[151] Another complained, "[Y]ou have a victim sitting there that you are almost sure they won't show up for trial and if they do, they are not going to make a very compelling witness."[152] The teenage girl, the staple of the statutory rape caseload, makes a particularly difficult witness:

> When you deal with these girls and they are, it's not just promiscuous but they're almost aggressive. They're out there, and they pretty much run their families, they pretty much run their schools, and they pretty much run their sex lives. And here you're intervening in that and you're asking them to come to court and they don't want to.... I've met with them and their families, and they will turn to their mothers and tell them to shut up and F— themselves. This is my victim.[153]

These quotations suggest that some prosecutors do not like working with statutory rape victims because they tend to be unreliable, untimely, not completely truthful, likely to exaggerate or to understate facts, or openly hostile or aggressive. Difficult witnesses inject a measure of uncertainty in case handling and trial strategies, and prosecutors are constantly trying to reduce uncertainties.[154] But if we look deeper, the interviewees reveal that their frustration in dealing with the teen victim population often stems from discomfort and shock at the lives these victims have led and the crimes they are reporting: "These are hard cases to do. . . .

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151. Interview with Prosecutor 1, Onyx County, *supra* note 141. Sex crime prosecutors generally lament the need to overcome juror bias against rape victims, and many admit that their predictions about juror bias influence their case-management decisions. *See* Frohmann, *supra* note 8, at 536-37.

152. Interview with Prosecutor 1, Emerald County, *supra* note 134.

153. Interview with Prosecutor 1, Macon County, *supra* note 98.

154. For an empirical evaluation of the relationship between uncertainty and prosecutorial discretion, see Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC'Y REV. 291 (1987).

[W]ho wants to deal with a bunch of abused kids? Who wants to sit around everyday and listen to these kids talk about these . . . things that happened to them?"[155] "[F]or a lot of these kids, most of them, it wasn't consensual. Even if they swore to high heaven they were consenting to it, if I peeled enough of the onion, layers of the onion back, I'd have a crying kid in my office. . . ."[156]

Listening to kids tell stories of abuse and sex and hearing them cry as they realize they were exploited can be a draining way to make a living even for those who believe in the mission of the SRVPP. And the sadness builds over time, so that for some it becomes impossible to leave the victims' troubles at the office.[157] When a prosecutor feels her personal life is being harmed by her caseload, it is time to get out:

> Just reading sex case after sex case just grinded on you. As a young married woman, it didn't make any difference if you were married or not married. Just read these stories about—this act is supposed to be engaging in sex—you want to think of it as love. You know that I live with this person, and it is going to be a special moment, whatever age you might be, and it wasn't. It was some dirty nasty thing. . . . "I had 14 beers and 3 shots of vodka. I threw up after I orally copulated him, and then we had sex and then he threw up on me" . . . or "we went to the dumpster and we had sex behind the dumpster and he laid his coat down." [C]ase after case after case you read on, and you went home, and you just wanted to have nothing to do with your spouse, nothing.[158]

Many of these interviewees are experienced prosecutors, and most had handled serious sex crime and domestic violence cases before coming to the statutory rape assignment. Yet the stories of teenage sex without romance, laced with intoxication, or fostered by violence or manipulation eroded their abilities to separate worklife from homelife, ultimately causing these prosecutors unhappiness and frustration in both arenas.

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155. Interview with Prosecutor 1, Emmanuel County, *supra* note 105.

156. Interview with Prosecutor 1, Ruby County, *supra* note 35.

157. Interview with Prosecutor 1, Violet County, *supra* note 145. She expressed her frustration as follows:

> I was just taking the victims home way too much. It was like I couldn't leave the victims at work and their problems at work and I was thinking about it at night and weekends and it was just too draining. I did it for two and a half years and that was a long time.

Id.

158. Interview with Prosecutor 3, Randall County, *supra* note 96.

A final point frequently made about the victim population concerns ingratitude and futility. The criminal court prosecutor commonly thinks of himself as "the good guy," the savior in the white hat who rides into town to restore order and to save the helpless victim. But in statutory rape cases, prosecutors often find themselves working outside of any support network and confronting hostility from all sides. "Everybody hated you. EVERYBODY! The victims hated you; the parents hated you because you weren't getting enough time; victims hated you because you filed the cases."[159]

> [W]hen you did the right thing in child abduction you united a family. It was immediate gratification. You saw the smiles. You saw the tears. You didn't hear this B.S.: "Well, I don't want to do anything. That was my daughter's fault. She had [ten] boys before she met this guy." . . . [T]hese cases are not gratifying most of the time. You seldom get a thank you.[160]

Prosecutors certainly do not need to be liked by the people involved in their cases in order to prosecute the offenders, but these comments suggest that the statutory rape caseload is extraordinary in the extent to which hostility and resentment permeate the victim population. Angry victims are not only unpleasant; they also are inclined to skip meetings, to doctor their testimony, and to be generally uncooperative with all phases of the prosecution.[161] Given

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159. *Id.* A similar view was expressed by the prosecutor from Garnet County: "The girls sometimes are mad at me; I'm the mean person who is standing between them and happiness and it doesn't make you as popular as it does being the prosecutor on other cases. The victims don't universally like you." Interview with Prosecutor 1, Garnet County, in Garnet County (Nov. 2, 2001) (on file with author).

160. Interview with Prosecutor 1, Emerald County, *supra* note 134.

161. Of course, many of these same traits can be found in the victims of domestic violence whose cases result in criminal prosecution. However, domestic violence prosecutors have overcome or circumvented this resistance in two important ways: first, state court hearsay rules have been relaxed so as to permit the introduction of some out of court statements to medical personnel, thereby obviating the need for the victim's cooperation when she is on the witness stand. *See, e.g.*, CAL. EVID. CODE § 1370 (Deering 2005). Second, prosecutors have educated juries and judges about the cycle of violence in abusive relationships that explains a victim's allegiance to her abuser; they portray her lack of cooperation as evidence of the abuse. Neither of these two factors tends to assist with a statutory rape case. Statutory rape cases rarely involve immediate medical attention and therefore the chance of obtaining hearsay-excepted statements is small. Additionally, in many cases there is no comparable psychological theory that explains a teenager's allegiance to her boyfriend as evidence of their sexual history. Common sense explains the

these working conditions, it is not hard to imagine how some prosecutors come to wonder why they bother.

C. *Begrudging the Limits of the Prosecutor's Role*

Because statutory rape cases often involve relationship dynamics that extend far beyond the reach of the courtroom, the prosecutor's influence is subject to both temporal and jurisdictional limits. When the case ends, or when the victim reaches eighteen, or when there are deeper problems that involve the victim's whole family,[162] the prosecutor's power is extinguished and her point of view becomes irrelevant. "These are two that really love each other and they want to get married when she's an adult so there's only so much I can do."[163] "We can't make their parents attend classes; we can't make their parents or dysfunctional family get into therapy. So we [can only] deal with the defendants and that victim, however young she is, is kind of back in that same situation. We can't remove her from the situation. . . ."[164]

In their comments about futility or limitations on their ability to solve problems,[165] perhaps the interviewees are implicitly responding to the difficulty of evaluating their efforts according to non-traditional measures. They resist the reorientation required by the new prosecution's problem-solving model. Where the case is the unit of analysis for evaluation purposes, we can assess the success of the prosecution effort by looking at the outcome of the case: Did it result in a conviction? Was it a felony conviction? What type of sentence was imposed? Under the new prosecution's framework, we have to assess how well the prosecutor's actions have addressed the underlying problem.[166] While some prosecutors are optimistic about

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allegiance, but the evidentiary leap to unlawful sex is often not warranted.

162. Prosecutors also point to the constraining influence of culture: where the victim and defendant both come from (and will likely return to) a cultural community that tolerates, supports, or encourages age-disparate relationships, no amount of outreach from the district attorneys' office about age of consent requirements is likely to change behavior. *See, e.g.*, Interview with Prosecutor 3, Randall County, *supra* note 96.

163. Interview with Prosecutor 1, Standard County, *supra* note 110.

164. Interview with Prosecutor 2, Violet County, *supra* note 108.

165. Problem-oriented police also must face caps on available resources and limitations on the legal powers of the jurisdiction for whom they work. SKOGAN ET AL., *supra* note 60, at 5.

166. ECK ET AL., *supra* note 49; *see also* Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 66, 111-15 (addressing the difficulty of developing measures of performance in problem-oriented assignments). Assessing how well a prosecution has succeeded in the SRVPP becomes particularly thorny when the defendant and victim decide to get married; when unwed pregnancy and welfare reliance are defined as the "problem" to be solved by the SRVPP, this

the impact their outreach and counseling sessions have had on the target populations (and on the community's awareness generally), it is next to impossible to determine if these efforts have had any significant impact on the prevalence of pregnancy or exploitation in the adolescent population.

Problem-oriented approaches generally suffer from imprecise or inadequate measures of effectiveness. While criminals can be incarcerated or otherwise removed from the community, social problems rarely disappear; at best they can be managed or kept under control.[167] It is therefore difficult to identify whether the problem-solving strategies used by police, prosecutors, or courts have had any effect on reducing the frequency of any given problem or on lessening its severity.[168] Teenage pregnancy and sexual exploitation are particularly intractable, and trends in both are affected by many factors that are not under prosecutorial control.[169] Consequently, although there is no doubt that California's teen birth rate has declined since the early 1990s, there is no way to attribute this decline (in whole or in part) to the new prosecution techniques of the SRVPP.[170] With respect to deterring or reducing sexual

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marriage would seem to be the perfect solution. Yet we should be (and many prosecutors are) worried about marrying sex-crime victims to their perpetrators, a result that might foster a lifetime of abuse rather than a solid family. For more information on the role of marriage in the SRVPP caseload, see Levine, *supra* note 5, at 208-73; Levine, *supra* note 115.

167. ERIKSON, *supra* note 53, at 205; GOLDSTEIN, POLICING, *supra* note 49, at 36.

168. With respect to community prosecution models, see Forst, *supra* note 9, at 135. In the policing context, see, e.g., MCELROY ET AL., *supra* note 2, at 183; SKOGAN ET AL., *supra* note 51, at 2. In the court context, see Dorf & Fagan, *supra* note 3, at 1505.

169. One prosecutor acknowledged her inability to make a real difference on the teen pregnancy front: "If you tackle teen pregnancy you have to tackle it from all angles, not just the simple little thing of taking a case to court and punishing somebody who got hot and bothered and having sex." Interview with Prosecutor 1, Emerald County, *supra* note 134.

170. The high water mark for California's teen birth rate was 1991; since then, almost all counties and the state overall have witnessed a fairly steady but modest decline. Four facts prevent us from knowing whether and to what extent the SRVPP is responsible for this downward trend. First, the decline began four years before the SRVPP was implemented on a pilot basis and five years before it was adopted statewide. Second, some counties with SRVPP units experienced an increase in their teen birth rates in the late 1990s, while a few counties without SRVPP units saw their teen birth rates fall. Third, most states across the United States also experienced declines in their teen birth rates since the early 1990s, but California is the only state to have used this problem-oriented strategy. Fourth, during this same time period, there were also significant changes in the economy and in the provision of health services

exploitation of teenagers, the SRVPP advocates are optimistic but the evidence is thin: some prosecutors tell anecdotes of specific adults who have desisted from having sex with a minor because they feared getting caught and punished, but the portion of serious crimes in the caseload (those that involve exploitation by trusted adults, very large age gaps, or violence) has increased over time, rather than decreased. While this increase may be due to improved reporting and investigation, it should also lead one to question whether teens are actually safer today than they were a decade ago.

Prosecutors thus identify a number of salient reasons they oppose the new prosecution's demands. They feel unqualified to counsel victims and their families and are concerned that they may be getting in over their heads. Moreover, because counseling and outreach sessions require significant investments of time and energy, busy prosecutors resent having to juggle their schedules to accommodate both social work and advocacy job requirements. Prosecutors also express concern about the victim population in statutory rape cases; victims are often hostile, disrespectful, and irresponsible, traits that render them unsympathetic to juries and difficult to control. A final complaint concerns the futility of the social work they perform. The prosecutor's influence is limited to getting a conviction in a particular case; it does not extend to forcing behavioral changes on the victim or his or her family and produces little or unclear impact on the underlying social problems the SRVPP was designed to address.

This discomfort with or hostility toward the social work components of the SRVPP job appears to be more than a difference of opinion in the ranks. Oftentimes both positive and negative views of the program were expressed by the same person during the course of one interview; it was not uncommon for a prosecutor to describe proudly his rapport with victims or his stature at the local high school and then to complain about his lack of qualifications or the burden that outreach efforts place on his job. Additionally, many pointed to the disparity between the breadth of the program as it was pitched by the state and the reality of their local practices. Linking prosecution efforts to teen pregnancy and welfare policies at

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for teens, both of which may have contributed to a falling teen birth rate. For all of these reasons, while there is a temporal correlation between the SRVPP and the improved teen birth situation in California, we can draw no conclusions about a causal relationship. For more information, see Levine, *supra* note 5, at 116-45; *see also* Nina Bernstein, *Behind Fall in Pregnancy, A New Teenage Culture of Restraint*, N.Y. TIMES, Mar. 7, 2004, at A1 (documenting national decline in teen birth rates since 1991 but not even mentioning statutory rape prosecution as one potential cause of this trend; experts focus on AIDS, access to contraception, economic realities, and education as significant factors).

the state level (an agenda my interviewees derived from the OCJP literature, Governor's speeches, and statewide annual meetings) simply exceeded what they could accomplish in their own communities. Hence, while it is likely true that some prosecutors are more enthusiastic than others about the problem orientation and social work features of the SRVPP, a significant portion of those prosecutors who spoke with me evinced resistance, skepticism, or frustration.

VI. IMPLICATIONS OF THE NEW PROSECUTION FOR PROSECUTORS

Prosecutorial resistance to the principal ideas underlying the new prosecution's problem-oriented approach may indicate that this model has inherent limitations in the prosecutor's office. These limitations are particularly acute when the crime at issue, in and of itself, is considered unimportant. Statutory rape is a prime example of a chronic criminal justice problem, a low-level offense committed frequently and persistently. While this characterization makes statutory rape well suited to problem-oriented strategies of intervention and management,[171] the comments of my interviewees suggest that this same trait makes the statutory rape caseload an anathema in the prosecutor's office. Even after several years of SRVPP funds and propaganda, handling statutory rape cases is not prized or valued within the district attorneys' office or by the criminal bar generally. No amount of community education or victim counseling can change this designation. Time and resources spent on problem-solving approaches to an unimportant crime do not make a prosecutor look like a real prosecutor to her colleagues; as a result, she may feel like less of a prosecutor to herself. In other words, because the new prosecution's approach forces a prosecutor to devote time to unimportant crimes and to serve competing role expectations, she may ultimately question her own identity within the office.

A. Institutionalizing Points of Resistance: Lackluster Offenses and Role Conflict

While statutory rape crimes by definition involve sex, they are not sexy. Their facts are rarely intriguing or glamorous, and the evidence is often very straightforward. Most cases involve a story from the victim about a factually consensual sexual act and an

171. Recall that problem-oriented policing approaches target quality of life offenses like peddling, vandalism, and disorderly conduct, behavior that constitutes chronic irritation for communities but does not pose serious danger or involve serious criminals. MCELROY ET AL., *supra* note 2, at 54-55.

admission from the defendant. When the victim is pregnant or parenting, a DNA test confirms the prior sexual activity. There are rarely third-party witnesses whose bias or ability to recall might be challenged by an attorney, police seldom need help with search warrant authorization, and the cases almost never go to trial. For all of these reasons, many prosecutors consider the statutory rape caseload dull. "They [the statutory rape cases] are easy. Either they had sex or they didn't have sex. It is not a difficult thing. . . . I can do four a day easy, four investigations a day."[172]

> Most of the prosecutors here want to be trying murderers and robberies and rapes and serious big-time felonies, or specific like child molestation, drug stuff. This is not perceived in the same way as that. . . . I think it is because the cases don't often go to trial. Guilt is pretty clearly established in most of these cases. These are not "who done it."[173]

> The crimes are not glamorous. These are not things that are going to get you in the newspapers. You are not going to get attention. You are not going to make any groundbreaking case law, because it is, by and large, Johnny and Julie had sex and they are far enough apart in age and Julie is underage, so it is a crime. They don't go to trial usually so you don't get the prestige of doing a trial and coming back to your colleagues and saying, "I won another trial!"[174]

As the above quotations suggest, the lack of trials in the statutory rape caseload not only renders the job boring,[175] but also signals that it is a dead-end for a prosecutor interested in building a career. To succeed in the district attorneys' office, one must "rack[] up trial stats."[176] Any assignment that requires a prosecutor to pass

172. Interview with Investigator 1, Inman County, in Inman County (Jan. 9, 2002) (on file with author).

173. Interview with Prosecutor 1, Garnet County, *supra* note 159.

174. Interview with Prosecutor 2, Randall County, *supra* note 109.

175. Prosecutors who described the SRVPP caseload as challenging tended to work in counties whose prosecution strategy was limited to handling serious or difficult cases; they did not file "garden variety" statutory rape cases at all, choosing instead to focus their resources on violent sexual assaults against minors or cases involving aggravated facts. *See, e.g.*, Interview with Prosecutor 1, Bayside County, in Bayside County (Jan. 11, 2002) (on file with author); Interview with Prosecutor 1, Aguilar County, in Aguilar County (Nov. 8, 2001) (on file with author).

176. Interview with Prosecutor 1, Randall County, *supra* note 143; *see also* Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 33 (noting that the traditional operational goal of the prosecutor's office is "maximizing the felony conviction rate" and that for individual prosecutors effectiveness is measured by

months or even years without going to trial is therefore considered to be a burden, or perhaps even a punishment. One prosecutor mentioned that when word circulated in her office that she had been given the statutory rape job, her colleagues asked, "What did you do wrong to get put there?"[177] Another prosecutor told me in confidence that she believed her supervisor had assigned her the statutory rape caseload as punishment for taking maternity leave.[178]

In addition to their non-trial tendencies, most statutory rape cases do not result in significant incarceration terms. Because the exposure in a statutory rape is minimal compared to that of most other felonies, prosecutors feel it is not regarded as a serious crime and that successful prosecutions are relatively meaningless to other criminal court legal actors.

> Because the [prison] exposure [for statutory rape] was 16-2-3 [sixteen months—two years—three years] instead of 3-6-8 [three years—six years—eight years] [for child molestation or rape] . . . . *we didn't just have to convince our colleagues that it was worthwhile, but had to convince the judges and go out there and talk about why unlawful intercourse was an actual crime* and should be taken seriously, and should [not] be looked at as [just] a misdemeanor.[179]

Even significant incarceration terms, once obtained, are not respected or celebrated. One prosecutor complained that she had difficulty justifying to her colleagues the prison term she obtained on a case involving an age gap of more than twenty years and multiple victims: "By the time we got done with jury trial, the gentleman is serving thirty-three years in prison. So again, I got a lot of flak for that, not from management, but from the other attorneys. 'That is ridiculous; that wasn't that bad.' You know, that was that bad."[180]

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the number of trials, the percentage of convictions, and the length of sentences obtained). For an essay arguing that the concept of winning trials and keeping score is nebulous, misplaced, and unprofessional, see Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996).

177. Interview with Prosecutor 2, Randall County, *supra* note 109.

178. Although her supervisor is no longer with the office, this interviewee would not put this statement on tape, and I promised I would not reveal any information about its source. However, she did emphasize that she worked extraordinarily hard during her tenure in the SRVPP to turn that assignment into a trial rotation.

179. Interview with Prosecutor 2, Ruby County, *supra* note 111 (emphasis added).

180. Interview with Prosecutor 1, Emmanuel County, *supra* note 105.

At least some prosecutors suspect that their colleagues' lack of appreciation for the statutory rape job[181] reflects a personal philosophy about the enforcement of the age of consent law. While prosecutors are technically charged with enforcing the laws as written, this official mandate does not prevent some of them from expressing opinions as to the propriety of this particular law: "I greet a lot of indifference and a lot of resistan[ce] from other deputies within the office. . . . I have had people tell me flat out they don't personally consider it a crime."[182]

> I think a lot of it is people perceive it as "morals police for high school kids" when that is really not what it is, but I think from the outside it looks that way, especially because they want you to focus on going out and speaking at schools and talking to kids about waiting. I mean, the whole "Sex Can Wait!" pencils—*things like that kind of indicate that your focus is more to teach children to be abstinent than to be a DA.*[183]

Engaging in social work or conducting community presentations addressing mild or technical violations of the Penal Code does not comport with most prosecutors' understanding of their purpose and function. Prosecutors are, first and foremost, lawyers. They learn the case method of legal analysis in law school and are taught to hone their litigation skills by engaging in adversarial contests on important matters. Their educational training and the lawyer subculture steer them in a particular direction, one that values courtroom advocacy and argument and pays little attention to community building or people service skills.

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181. To be fair, a few interviewees mentioned that at least some of their colleagues actually coveted the statutory rape job. However, their perceived envy stemmed not from the cases but from the resources available to the statutory rape unit; the SRVPP prosecutor has considerable autonomy to schedule her day and to handle her cases as she sees fit, and in some offices the SRVPP prosecutor has a designated parking space, which is a rare commodity. *See, e.g.*, Interview with Prosecutor 1, Pearl County, in Pearl County (Nov. 13, 2001) (on file with author); Interview with Prosecutor 1, Violet County, *supra* note 145. This theme emerges in the problem-oriented police literature as well. For example, some police officers interviewed by McElroy and his colleagues envied the independence and resources afforded their counterparts in the community policing unit. MCELROY ET AL., *supra* note 2, at 128-49.

182. Interview with Prosecutor 1, Franks County, *supra* note 114. A similar view was expressed by the prosecutor from Sapphire County, "Most prosecutors don't want to do it because a lot of people don't really see the moral imperative to it, first of all. . . . [T]hey don't see it, and why don't we just leave these people alone?" Interview with Prosecutor 1, Sapphire County, *supra* note 104.

183. Interview with Prosecutor 2, Randall County, *supra* note 109 (emphasis added).

Furthermore, as a subset of the lawyer population, many people who become prosecutors have a keen interest in fast-paced, interesting trial work. They like to investigate and to adjudicate hard-core crimes and hard-core criminals, and most feel personally satisfied when they are responsible for taking a dangerous person off the streets. Because this level of satisfaction derives at least in part from beating the adversary in a contest of skill and stamina, a prosecutor's reputation for strength hinges on his or her willingness to go to trial, especially in hard cases. These feelings are not merely personal to each prosecutor; they are incorporated into the culture of the district attorneys' office and, as Malcolm Feeley argues, into the court system as a whole.[184] The entire office celebrates any individual prosecutor's trial victory and mourns each individual's loss. Such collective responsibility is reflected in a variety of ways, from the "high-five" in the hallway or the celebratory drink after work, to promotions, transfers, and increased funding for certain units or branches.[185] Because of this *esprit de corps*, it becomes impossible to distinguish a person's internal measure of success from his adoption of the office norm that equates courageous trial work with good prosecution. The "adjudicative ideal" of the adversary system pervades and defines every aspect of the criminal justice professional's worklife.[186]

Elsewhere, I have argued that many of the prosecutors I interviewed expressed a sincere desire to do justice in each statutory rape case, to design and implement a case disposition that accounts for the degree of harm imposed on the victim and the danger to society caused by the defendant's continued presence.[187] Admittedly, this objective seems thoroughly inconsistent with the adrenaline-rush portrait I painted above. But therein lays the fundamental ambivalence plaguing the statutory rape prosecutor: one must work in an office that is sustained by an image of courtroom domination—

184. MALCOM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979). The traditional image of the combat-oriented DA has also been enshrined in the popular press and in the entertainment industry. Fighting against this paradigm is thus an extraordinarily difficult task. *See* Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 60; *see also supra* note 97 and accompanying text (explaining the Carlisle County prosecutor's perception of the public image of prosecutors in his community).

185. *See* Frohmann, *supra* note 8, at 535.

186. *See generally* FEELEY, *supra* note 184, at 21-24, 278-90.

187. *See* Levine, *supra* note 5, at 208-73; *see generally* Levine, *supra* note 115.

where one's prowess is measured in increments of testosterone[188]—and simultaneously handle cases that require a soft touch and a sensitive soul. The tension between fulfilling the adjudicative ideal and meeting the demands of everyday practice in the SRVPP unit is palpable.[189]

The traditional institution of prosecution recognizes two mutually exclusive roles: social workers and prosecutors. Persons who conduct community outreach sessions are educators, social workers, or abstinence promoters, but they are decidedly *not* prosecutors. Prosecutors work in offices, conduct conferences with police officers and defense attorneys, and argue in court on important criminal matters. They do not circulate through school districts giving away sex education props and abstinence lessons. In the words of the Randall County prosecutor quoted above, "[Distributing] 'Sex Can Wait!' pencils—things like that kind of indicate your focus is more to teach children to be abstinent than to be a DA."[190] Despite the aspirations of the SRVPP, many prosecutors emphatically believe that a person cannot simultaneously be a serious prosecutor and a community sex educator.

But the SRVPP, and the new prosecution's problem-oriented model of prosecution more generally, forces the prosecutor to assume both roles at the same time. It thus produces a tremendous

188. For research and commentary about how testosterone is implicated in the legal profession, see JAMES MCBRIDE DABBS, HEROES, ROGUES, AND LOVERS: TESTOSTERONE AND BEHAVIOR 128-32 (2000). Analysis of saliva samples from trial lawyers and non-trial lawyers revealed that the former have higher testosterone levels than the latter. This disparity held for both female and male lawyers. This finding was consistent with the author's theory that high testosterone levels are typically found in people who seek out and dominate face-to-face confrontations. Dabbs also speculates on the causal relationship between a career as a trial lawyer and testosterone levels: he suspects that high testosterone levels induce a person to become a trial lawyer, rather than the other way around. Moreover, he theorizes that criminal defense lawyers have more testosterone than prosecutors, because high testosterone levels are more likely to correlate with a rebellious personality than with a conservative one. Unfortunately, he did not collect data to answer either of these questions. *Id.*

189. The same tensions plague prosecutors in the Indianapolis District Attorneys' Office, where two tracks of work have developed: trial work and community prosecution work. Prosecutors assigned to the community prosecution track find the work time consuming and demanding, and many feel underappreciated by their colleagues. They are frustrated both by their inability to measure their accomplishments and by their inability to gauge the career value of those accomplishments. In short, they "wrestle[] constantly, and at times painfully, with a sense of ambiguity in their roles and status within the Prosecutor's Office." Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 56.

190. *See* Interview with Prosecutor 2, Randall County, *supra* note 109.

personal and professional conflict for the prosecutor in the SRVPP unit, as she has been led to believe throughout her professional life that these roles must be kept separate. Even the comments of her colleagues reinforce her fear that if she dilutes her commitment to the adversarial ideal by engaging in social work activity, she is less than fully prosecutorial. This shift in roles is what makes the new prosecution revolutionary in aspiration and yet difficult to fully implement.

This tension between aggressive law enforcement and social work is also manifest in the problem-oriented policing literature, as the designation of "police officer as crime fighter" that took hold in the 1930s has affected practices, recruitment, training and attitudes ever since.[191] Community police officers believe that their patrol counterparts regard problem-oriented methods as distinct from "real" police work and community-based police as distinct from "real" cops.[192] As in the prosecution context, this characterization derives both from the style of work performed by community-based officers and the crimes with which they are concerned.

However, these objections have not prevented problem-oriented policing from taking hold in many urban departments because its contributions and workstyle build upon pre-existing norms of police work. Despite the crime-fighter image, the performance of community caretaking functions has long been an important part of the police officer's job (defined broadly as "to protect and to serve").[193]

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191. *See, e.g.*, Timothy N. Oettmeier & Lee P. Brown, *Developing a Neighborhood-Oriented Policing Style*, *in* COMMUNITY POLICING: RHETORIC OR REALITY 129-30 (Jack R. Greene & Stephen D. Mastrofski eds., 1988).

192. MCELROY ET AL., *supra* note 2, at 34-35; *see also* SKOGAN ET AL., *supra* note 51, at 22 (noting that police officers "scoff at performing tasks that smack of 'social work'").

193. KELLING & MOORE, *supra* note 49, at 2-4 (noting that early American police forces provided a wide variety of social services in addition to order maintenance and crime prevention functions). "In the late 19th century, municipal police departments ran soup lines; provided temporary lodging for newly arrived immigrant workers in station houses; and assisted ward leaders in finding work for immigrants." *Id.* (footnotes omitted); *see also* DAVID H. BAYLEY, PATTERNS OF POLICING: A COMPARATIVE INTERNATIONAL ANALYSIS 23-52 (1985) (describing the regulatory functions police used to serve in the previous century, and stating that the social service component of police work was reduced, or driven underground, in the first half of the twentieth century, as police sought professional status and tried to insulate themselves from the influence of local community and political leaders); Carl B. Klockars, *The Rhetoric of Community Policing*, *in* COMMUNITY POLICING: RHETORIC OR REALITY 245-46 (Jack R. Greene & Stephen D. Mastrofksi eds, 1988). Today the police officer is viewed as a hybrid professional, charged with crime control, order maintenance, and community caretaking functions. *See generally* MARC L.

Indeed, some have observed that "the primary workplace of the police *is* the community."[194] Consequently, encouraging specific officers to prioritize community caretaking functions over crime-fighting generates a division of labor in the workforce by fostering specializations but does not create a dichotomy between new and old roles.[195] Moreover, patrolmen recognize the value of the information obtained pursuant to community policing activities: the contacts made on the street, with businessmen, or in various agencies often prove useful when the department is trying to locate fugitives or to solve crimes.[196] Finally, community or problem-oriented policing can be seen as formally acknowledging the decisionmaking authority police officers already had and used, but in more hidden ways.[197] Community policing thus does not spawn new forms of police discretion; it simply brings them out into the open. For all of these reasons, although problem-solving does not have the same status as serious crime-fighting in police agencies, community police officers do not seem to experience the same degree of role conflict that confounds the problem-oriented prosecutors in the SRVPP units.

For prosecutors, the benefits of social service work are tempered by weighty institutional constraints. Despite their enormous discretion to handle particular cases, prosecutors are institutional

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MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 4-7, 9-10 (2d ed. 2003). These caretaking functions are not just common law duties; they sometimes appear in state statutes governing police authority. *See, e.g.*, OR. REV. STAT. § 133.033 (2003) (specifying community caretaking functions including, but not limited to, entering property or stopping traffic to prevent harm, rendering aid, or locating missing persons).

194. Forst, *supra* note 68, at 297.

195. Mastrofski, *Community Policing*, *supra* note 52. Mastrofski emphasizes that the police role is intrinsically paradoxical, encompassing crime control, suppression of disorder, protection of rights, solution of social problems, and reinforcement of community. Reform (or reform rhetoric) shifts our focus from one area to another, but does not dramatically restructure the police mission. *Id.* at 66; *see also* Oettmeier & Brown, *supra* note 191, at 129 (arguing that adopting Neighborhood-Orienting Policing as an operational philosophy will lead to a shift in emphasis between the role of policeman as law enforcer and the role of policeman as compassionate assistant).

196. MCELROY ET AL., *supra* note 2, at 135-38; Oettmeier & Brown, *supra* note 191, at 131 (noting that community policing strategies that develop closer ties between the police and the citizenry should improve the department's ability to prevent crime, to identify and to arrest criminals, and to fight crime generally: it is thus consistent with, not antithetical to, traditional crime fighting goals).

197. SKOGAN ET AL., *supra* note 51, at 6. While community based or problem-oriented strategies have not completely transformed police organizations in the United States, I argue that they have had more success permeating police organizations than prosecutor organizations for the reasons stated in the text.

actors. Their hiring and promotions are largely determined by institutional resources and limitations,[198] and they respond to institutional norms about what constitutes proper prosecutorial behavior and what amounts to a valuable prosecutorial contribution. One of the most important norms is what it takes to be a good prosecutor: success in the office depends on one's success in winning trials, particularly in challenging cases.[199]

Working the statutory rape cases is an obstacle to success in two important ways. First, the problem-oriented approach required by the SRVPP unit takes time and resources away from the prosecutor's ability to develop trials in other types of cases. A prosecutor must spend an extraordinary amount of time with a victim and his or her family just to get the case off the ground; the efforts devoted to counseling these people are often well-intentioned yet not well-received, and oftentimes their impact is felt to be fleeting. An SRVPP prosecutor must also expend significant time conducting outreach sessions, giving presentations at the high school, talking with medical providers, and the like. These efforts might lead to new case referrals (which might, at least in theory, lead to trials), but in fact most prosecutors feel the time spent doing outreach is generating more in the way of deterrence than new cases. Moreover, outreach keeps the prosecutor out of the courtroom and out of the office where the real prosecutorial work is taking place. Outreach, as the cornerstone of the new prosecution's problem-oriented approach, is a double-edged sword: it might help to solve the underlying problem, but it does nothing to advance the prosecutor's career.

Secondly, and perhaps more importantly, statutory rape cases do not present interesting legal challenges. They are not complex and rarely go to trial. Hence, no matter how successful a prosecutor might be in getting his defendants to plead guilty or in working with the court to design appropriate dispositions, none of these successes amounts to even one success at trial. A prosecutor who racks up an

198. *See generally* Harvey G. Friedman, *Some Jurisprudential Considerations in Developing an Administrative Law for the Criminal Pre-Trial Process*, 51 J. URB. LAW 433, 459 (1974).

199. I note that this institutional norm seems to conflict with the professional ethical standards imposed on prosecutors. For example, an official comment to Rule 3.8 of the ABA Model Rules of Professional Conduct indicates that "a prosecutor has the responsibility of a minister of justice and not simply that of an advocate." *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2004); *see also* Berger v. United States, 295 U.S. 78, 88 (1935) (stating that a sovereign's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done").

impressive array of plea bargains in what others regard as easy cases is not likely to gain the respect of her peers or to advance within the office. The SRVPP job thus presents a dilemma for the prosecutor interested in achieving success: its outreach component keeps the prosecutor from doing what others regard as "real" prosecutorial work, and its caseload rarely provides the prosecutor with the opportunity for "real" prosecutorial victories. As a result, many prosecutors resist the SRVPP assignment and the problem-oriented approach it requires because they feel driven to satisfy institutionalized norms about what it takes to make a good prosecutor.

B. (En)gendering the Conflict

Here it seems appropriate to comment on the impact of the gendered nature of the statutory rape job within the district attorneys' office. While my research did not reveal a disproportionate number of women in the statutory rape assignment,[200] in at least a few of the offices the topic of women's perceived affinity for this assignment came up during the interviews. For example, one prosecutor mentioned that after he held the position initially, every subsequent SRVPP prosecutor in his county (a total of five or six) was female.[201] He suggested I should draw my own conclusions from this pattern. A prosecutor from Pearl County opined that women attorneys might have an easier time relating to the victims because they were mostly female teens; she then admitted that a sensitive man could also handle the job.[202]

From these comments one might infer that the statutory rape caseload is inherently better suited to a woman's touch. This suitability might be said to stem from women's empathy or kinship with adolescent female victims generally, or from the female prosecutor's potential for serving as a role model for this

200. Others have noted that women in criminal justice professions tend to be over-represented in domestic and juvenile assignments and that those jobs typically are performed by women prosecutors. *See, e.g.*, Edith Elisabeth Flynn, *Women as Criminal Justice Professionals: A Challenge to Change Tradition, in* JUDGE, LAWYER, VICTIM, THIEF: WOMEN, GENDER ROLES, AND CRIMINAL JUSTICE 320 (Nicole Hahn Rafter & Elizabeth Anne Stanko eds., 1982).

201. Interview with Prosecutor 1, Randall County, *supra* note 143. Actually, this claim was not entirely correct—one of the subsequent SRVPP prosecutors in Randall County was male. However, his tenure in the job was short-lived, and the interviewee's perception that this had become an entirely female job is the salient point.

202. Interview with Prosecutor 1, Pearl County, *supra* note 169.

population.[203] Perhaps female prosecutors are more sensitive by nature than their male colleagues, as the Pearl County prosecutor's comment seems to suggest. But these seem to be superficial aspects of a much deeper issue, the fact that there are masculine and feminine aspects to the prosecutor's job. The masculine side is embodied in the image of the courageous trial lawyer, the advocate who hunts down bad guys and puts them away. The masculine side promotes and reinforces the adjudicative ideal of the justice system.[204] The feminine side is less visible and less aggressive. Its image is the caretaker, the nurturer, and/or the community educator; it encompasses the very skills required for the problem-oriented statutory rape prosecutor to do her job well. It is the antithesis of the adjudicative ideal.

The evidence I have presented here indicates that prosecutors as a group admire and strive to cultivate traditionally masculine skills (the courageous trial lawyer) and devalue or resist the development of the feminine skill set (the caretaker or problemsolver). The priority given to masculine skills likely derives from the gendered background of the prosecutor's office, and perhaps from the gendered nature of the criminal justice system more generally. Women have long constituted a far smaller number of those involved in all aspects the criminal justice system: lawyers, judges, police officers, offenders, and jailers.[205] One scholar has remarked that for much of our history, "criminology and penology were relatively blind to the fact that not everyone is male. . . ."[206] As a result, crime itself emerged as a gendered phenomenon. Male

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203. This view was expressed by Prosecutor 2 from Randall County. *See supra* note 109 and accompanying text. For a similar argument regarding women police officers, see Diane Lovewell Pike, *Women in Police Academy Training: Some Aspects of Organizational Response*, *in* THE CHANGING ROLES OF WOMEN IN THE CRIMINAL JUSTICE SYSTEM: OFFENDERS, VICTIMS, AND PROFESSIONALS 261, 265-66 (Imogene Moyer ed., 2d ed. 1992). Note that one interviewee recognized the importance of male prosecutors as role models for the female victims: he suggested that male prosecutors may be the only adult men the victims have met who have not tried to take advantage of them sexually. *See* Interview with Prosecutor 4, Ruby County, in Ruby County (Nov. 19, 2001) (on file with author).

204. *See generally* FEELEY, *supra* note 184.

205. *See* CAROL SMART, WOMEN, CRIME AND CRIMINOLOGY: A FEMINIST CRITIQUE 2 (1977); THE CHANGING ROLES OF WOMEN IN THE CRIMINAL JUSTICE SYSTEM (Imogene L. Moyer, 2d ed. 1992). *See generally* NGAIRE NAFFINE, FEMALE CRIME: THE CONSTRUCTION OF WOMEN IN CRIMINOLOGY (1987).

206. Celia Wells, *The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection*, CRIM. L. REV. 503, 504 (2004).

approaches to both criminal behavior and justice system responses monopolized our thinking until only recently, when the presence of women as both offenders and criminal justice officials began to garner increased attention.[207] In light of this trajectory, it should not be surprising that masculine values and skills have defined the practice of law in criminal courts and in police stations.[208]

This hierarchy of values is certainly not unique to the criminal justice arena; it characterizes the public sphere more generally. Wendy Brown, for example, argues that traditionally only men have had access to the public sphere of government and business, where the realm of rights dictates that the pursuit of self interest, rather than the common good, is the primary concern.[209] In the private sphere, household and family are the loci for the satisfaction of human needs, relationships, and selflessness. Because for the most part women have been consigned to the private world of home and relationships, conventionally female values remain largely absent in the public arena and appear alien in discussions of rights and citizenship.[210] Martha Fineman carries this analysis even further, arguing that caretaking work, including practices that emphasize connectivity and responsibility for others, is devalued in society generally.[211]

The new prosecution model forces the prosecutor to confront and to reconcile the dichotomy between male and female skills and priorities. For example, the SRVPP prosecutor works in the public sphere, but the statutory rape caseload does not allow or require her to flex her rights-oriented advocacy muscles because the cases do not go to trial. She instead must devote much of her time to "feminine" work in the form of counseling and community presentations. Her contributions to the office will tend to be ignored, misunderstood, or underappreciated because they do not demonstrate the masculine skills other prosecutors covet or reward. Yet those are the very contributions she must make in order to succeed in the statutory rape assignment and to animate the goals of the new prosecution more generally.

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207. *See supra* notes 201-03 and accompanying text.

208. *See generally* GOLDSTEIN, POLICING, *supra* note 49 (arguing that problem-oriented police forces have had to counter these same stereotypes).

209. WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 180-84 (1995).

210. *Id.*; *see also* Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, 117, 117-35 (David Kairys ed., 1982).

211. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 29 (2000).

I am not arguing that the new prosecution might be resisted or devalued because of the gender of the people who hold these types of assignments (although future research may be able to document such a trend). Instead, I am suggesting that the nature of the work being done in the new prosecution settings gets characterized as feminine, and thus is regarded as implicitly less valuable to the enterprise of prosecution.[212] Moreover, because it appears out of sync with the rights discourse that characterizes the adversary system and seems more appropriate for the private sphere of home and relationships, the social work component of the new prosecution job remains problematic for those who must perform it.

C. Overcoming Institutional Constraints to Make Problem-Solving Work

Despite the problems articulated by my research subjects, broadening the prosecutor's role to encompass the new prosecution's problem-solving objectives may produce tangible benefits. The prosecutors with whom I spoke, as well as those in other cities that have adopted a version of the problem-oriented prosecution model,[213] reveal that problem-oriented prosecutors become attuned to the issues, needs, and priorities of the communities they serve. They develop information networks among local agencies and come to regard the district attorneys' office as one of many community service agencies, rather than as just an arm of the criminal justice system. Problem-oriented prosecutors listen more closely to the comments and complaints of crime victims and their families in order to provide a more holistic response to their suffering and to make the criminal justice system more user-friendly. But most importantly, they develop a proactive orientation towards crime that inspires a focus on crime reduction, not just on punishment and incarceration. By redirecting their attention and resources to deterrence and prevention measures, these prosecutors aim to make communities safer by reducing the number of new crimes that are committed in the first place. Given the failure of many recent enforcement or punishment initiatives to influence the crime rate,[214]

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212. One prosecutor's comment that she received the statutory rape caseload as punishment for taking maternity leave suggests that the link between the SRVPP job and the female gender in some offices may be considerably more sinister than the bulk of my evidence shows. *See supra* note 178 and accompanying text.

213. *See, e.g.*, Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 24-32 (discussing the experiences of the prosecutors in Austin, Boston, Indianapolis, and Kansas City).

214. "Most of the variation in crime rates can be explained in terms of

redesignating the prosecutor's office as a crime-reduction bureau[215] seems like a worthwhile strategy, one that fits squarely within an expansive understanding of criminal justice priorities.[216]

In order for these benefits to accrue, prosecutors must accept the reorientation required by this new set of objectives; they must modify their workdays and their workstyles to accommodate an increasing list of duties that the prosecutor's office must undertake in order to do the job effectively. But where a significant portion of the population charged with implementing new strategies resists making these accommodations, tinkering at the individual level will not suffice. Instead, we need to consider making institutional changes that will overcome individual reluctance and will induce the revolution that new prosecution's problem-oriented, crime reduction approach requires.

What might be done to minimize the tension between the (masculine) institutional values and the (feminine) problem-oriented approach? Increasing the diversity of the population of prosecutors may help lessen the power that white males have traditionally enjoyed,[217] but I suspect that something more than just new faces will be required. One possibility is to rethink the institutional values of the prosecutor's office. For example, a jurisdiction dedicated to fostering the new prosecution would expand its hiring process to include people with personalities and life experiences that go beyond the "hard-core litigator" prototype. While traditional

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structural factors having nothing to do with criminal justice processes, such as unemployment rates, education, age distribution, and ethnic heterogeneity." David H. Bayley, *Community Policing: A Report from the Devil's Advocate, in* COMMUNITY POLICING: RHETORIC OR REALITY 228 (Jack R. Greene & Stephen D. Mastrofski eds., 1988); *see also* Klockars, *supra* note 193, at 250 (noting that the "big ticket" items that determine the amount and distribution of crime are economic conditions, including poverty and inequality; occupational opportunity; education, including moral, religious, family, and secular; and dramatic social, cultural, and political changes); FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 97-105 (2001).

215. The problem-solving model in the policing context is often pitched as a means to reduce crime, but is then transformed into a promise of crime prevention. This semantic shift is important because the effects of crime reduction efforts can be measured, while those of crime prevention efforts cannot. Klockars, *supra* note 193, at 251-52.

216. Joan Jacoby, a noted prosecution scholar, has remarked that crime prevention is "*the* new function in prosecution today." Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 46 (emphasis added) (internal quotation marks omitted).

217. Frances P. Bernat, *Women in the Legal Profession, in* THE CHANGING ROLES OF WOMEN IN THE CRIMINAL JUSTICE SYSTEM: OFFENDERS, VICTIMS, AND PROFESSIONALS 307, 307-21 (Imogene L. Moyer ed., 2d ed. 1992).

litigation skills are important for a prospective prosecutor, in a problem-oriented office these traits should be supplemented by a background in community work and/or demonstrated problem-solving abilities.[218] An office might specifically require prospective prosecutors (as one component of the application process) to have some educational or work background in psychology or sociology. A prerequisite of this sort would increase the likelihood that each person in the office has a greater sensitivity to the issues at stake in these cases, and a broader skill set, before joining the office.

Within the past twenty years, many offices have hired full- or part-time victim/witness advocates to fulfill this "sensitivity" role.[219] But while the presence of in-house social workers provides victims access to important services, it relieves prosecutors of the responsibility for shouldering any part of this effort. This division of labor therefore perpetuates the distinction between prosecutors and social workers and reinforces the idea that prosecutors' time is best spent in court.[220] Moreover, almost all of these victim advocates are women, a trend that highlights the "feminine" nature of social work[221] as distinct from the "masculine" nature of advocacy work.

Reformulating how prosecutorial success is measured is another possible intervention. The new prosecution jurisdiction would alter its standards for promotion within the office to reward prosecutors for time spent on victim services or community education efforts and to discourage a mentality that equated achievement with winning at trial. It would, in the words of the Kansas City District Attorney, attempt to "wean people off the need for an immediate victory."[222]

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218. The District Attorney of Kansas City reports that she asks all applicants about their community work and interests and that those who lack such a background have little chance of being hired. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 64.

219. Coles and Kelling found the presence of victim advocates in the offices they studied as well. Moreover, in many of the successful problem-oriented offices, the director of the victim advocacy program was considered a member of the executive staff, providing a professional status that had previously attached only to lawyers. *Id.* at 53.

220. A number of my interviewees mentioned the importance of having prosecutors, rather than victim advocates, do the outreach presentations, particularly at schools. They felt the message to students about the criminality of adult-teen sex would be diluted if delivered by someone other than the prosecutor. The implications of prioritizing the criminal aspects of the problem will be discussed further in Part VII.

221. *See* Anita Bernstein, *Engendered by Technologies*, 80 N.C. L. REV. 1, 33-47 (2001).

222. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 61 (internal quotation marks omitted).

Recasting the framework for career success would require support from all levels of management, from the elected district attorney to her upper-management team to unit supervisors, all of whom must provide encouragement, training, and incentives for prosecutors to expand their tool kits to encompass crime reduction and community service strategies. It is not enough just to expect line-level prosecutors to develop these new personas without any guidance or inspiration from their leaders and bosses. That would be unrealistic, given the long standing institutional norms that dictate the meaning of success. A change in that definition must derive from the top. "[M]anagement cannot dictate attitudes[,] but management can provide the necessary support to facilitate acceptance of an alternative style of [prosecution]."[223]

What would this support look like? To begin with, a clear mission statement from the head of the office that plainly articulates the goals of the new strategy would set a positive tone for both internal and external relations. Moreover, the head of an office committed to developing the new prosecution must clearly inform her employees what is expected of them and what the rewards will be, in order to overcome the uncertainty that invariably accompanies the assignment of new and unfamiliar duties. But perhaps most importantly, the office should avoid creating a dual track system for its prosecutors; every lawyer should receive in-house training in problem-solving techniques[224] and the opportunity to work on crime reduction or prevention policies. This approach should not be restricted to a handful of assignments, particularly when those assignments correlate with crimes that already hold a low status within the office. Furthermore, lawyers should be recruited and rewarded for new prosecution work, in order to demonstrate the career value of these efforts. Those who succeed in their community or problem-solving work should be moved up to "desirable" positions within the office in order to communicate that such efforts are essential to a successful career as a prosecutor. The District Attorney of Boston refers to this process as a form of osmosis, an attempt to "seep the ethic" of problem-solving in among a broad array of prosecutors rather than restricting it to few members of a select bureau.[225]

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223. Oettmeier & Brown, *supra* note 191, at 131.

224. One might even contemplate making adjustments to the standard law school curriculum in furtherance of this retraining objective. With its near-exclusive focus on cases and case law and reliance on individualized exams (rather than on group-based projects) for assessment, law school offers students few opportunities to develop problem-solving skills.

225. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 58.

Such top-down recognition of bottom-up efforts is, in my view, critical for favorable reception within the office: until the powers-that-be explicitly demonstrate that victim- or community-oriented skills are valued by the institution, prosecutors will be reluctant to carve time out of their courtroom schedules for these non-advocacy efforts.[226] Moreover, if a certain percentage of each prosecutor's time was required to be spent conducting outreach, the jurisdiction would likely attract a different crop of job applicants for entry level positions; those who were only interested in trial practice would seek work elsewhere. Changing institutional norms is neither easy nor quick, and it requires commitment at every level in order to take hold.

Evidence from Boston, Massachusetts, suggests that this type of reorientation in hiring and promotion is possible.[227] In Boston, the second most powerful person in the office heads both the community prosecution teams and the district court trial calendar. But more importantly, this leader was promoted from the community prosecution bureau, a move that signaled to other prosecutors and to the community the importance of community prosecution work. All new prosecutors receive training in community prosecution initiatives and strategies and are encouraged to think about the clusters of problems presented by a particular defendant or at a particular location. Finally, the office affirmatively recruits for the community prosecution positions by offering better pay, better office equipment, opportunities to second chair high-profile cases, and priority in the next round of assignments.[228]

Furthermore, the recent upward trajectory of domestic violence prosecutions in the United States demonstrates that prosecutorial prioritization of crimes is not a static phenomenon. Prosecutors can be convinced to allocate resources, attention, and career value to what were once regarded as low-priority crimes if the office superiors and the public support such a move.[229] Before the 1980s,

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226. Similar calls for institutional support of problem-solving approaches can be found in the policing literature, as scholars have noticed that departments with supportive upper and mid-level management are more successful in solving community problems. Suggested reforms in police agencies include departmental training in problem-solving strategies and leadership vision statements that identify community-based and problem-oriented approaches as central to the department's mission. *See, e.g.*, MCELROY ET AL., *supra* note 2; SKOGAN & HARTNETT, *supra* note 49, at 5-7, 88-105.

227. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 26, 57-58.

228. *Id.*

229. *See, e.g.*, 42 U.S.C. § 10410(a)(2)(E) (2000) (providing federal funding to states for activities such as "the adoption of aggressive and vertical prosecution

an instance of domestic abuse was routinely viewed by all levels of the criminal justice system as a crisis, rather than as a crime.[230] But over the past twenty years, in response to public pressure and established linkages between domestic violence and homicide rates,[231] special units dedicated to domestic violence have sprung up in prosecutors' offices across the country in order to reorient the prosecutorial response to this crime.[232] In many offices only experienced prosecutors are assigned to these units, and the domestic violence assignment often leads to future placement in a career criminal or homicide squad (which is often seen as the

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policies" for domestic violence"); *see also id.* § 10415(b)(3)(A)-(B) (making available "model state leadership grants" to ten states with policies that "authorize and encourage prosecutors to pursue cases where a criminal case can be proved . . . and . . . implement model projects that include . . . a 'no-drop' prosecution policy" for domestic violence crimes); Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 939-42 (1999) (stating that heightened public awareness and recognition of domestic violence as a societal and public safety issue resulted in domestic violence legislation at both the state and federal levels).

230. *See* O'Connor, *supra* note 229, at 939 (explaining that historically the criminal justice system treated domestic violence as a private family matter, and thus, for the most part failed to initiate or follow through on criminal charges); *see also* Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 298-99 (1993) (describing the particular experience of San Diego, California, until the mid-1980s).

231. *See* LENORE E. WALKER, THE BATTERED WOMAN 39-44 (1979) (explaining that violent relationships can escalate to homicidal and suicidal levels); Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUD. 300 (1999); Bettina Boxall & Frederick M. Muir, *Prosecutors Taking Harder Line Toward Spouse Abuse, Violence: New Legal Techniques Tested, but Critics Say Attacks on Women Are Still Not Taken Seriously Enough*, L.A. TIMES, July 11, 1994, at A1 (observing that prosecutors are responding to a "growing volume of domestic violence complaints and years of pressure from women's groups" by implementing new techniques and seeking harsher penalties in domestic violence cases; prosecutors consider strong domestic violence policies a form of "murder prevention").

232. Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 52; *see also* FLA. STAT. ANN. § 741.2901(1) (West 2005); CAL. PENAL CODE § 273.81 (Deering 2005) (establishing procedures for specialized units or prosecutors for domestic violence cases in states' attorneys' and district attorneys' offices); Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse, in* WOMAN BATTERING: POLICY RESPONSES 95, 95-112 (Michael Steinman ed., 1991); Boxall & Muir, *supra* note 231; Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 466 (2003) (explaining that many prosecutors' offices have adopted aggressive "no-drop" policies for domestic violence cases).

pinnacle of a prosecutor's career).[233] These developments in the prosecutor's office mirrored the adoption of mandatory arrest policies[234] in local police departments and the meting out of harsher punishments, including mandatory (often year-long) counseling programs,[235] by the trial courts. In a relatively short period of time, domestic violence prosecutions became a priority among law enforcement officials, the result of a consistent message about their importance broadcast from all angles. With a similar level of support from above (management) and below (the public),[236] prosecutors could be convinced to support the expansion of their role into crime prevention and reduction more generally.

Examining how prosecutors construct and understand their responsibilities to the larger population reveals the depth at which we must look to see how success is defined through institutionalized prosecutorial norms. The ideologies that constitute the image of the good prosecutor are not just perpetuated by overt or purposeful behaviors; subtle messages about the value of certain practices contribute to the institutionalization of the case-based, rather than problem-based, approach to the criminal justice system. Problem-oriented approaches to criminal justice require revolutionary ways of thinking about criminal justice actors, their roles, and their

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233. Cahn & Lerman, *supra* note 232 at 101-104; Coles & Kelling, *Emergent Strategies*, *supra* note 9, at 74-77; Rolanda Pierre-Dixon, Domestic Violence—Protocol for Santa Clara County 15-23 (1996) (unpublished manuscript, on file with author) (specifying that only specially trained prosecutors with minimum one year felony prosecution experience will qualify to work in the vertical domestic violence unit).

234. Boxall & Muir, *supra* note 231; Gwinn & O'Dell, *supra* note 230, at 314; Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1519 (1998); O'Connor, *supra* note 229, at 945 (1999); *see also* Cahn & Lerman, *supra* note 232 at 98-100 (discussing varieties of new police programs to improve responsiveness to domestic violence complaints).

235. KERRY HEALEY ET AL., U.S. DEP'T OF JUST., BATTERER INTERVENTION: PROGRAM APPROACHES AND CRIMINAL JUSTICE STRATEGIES 1 (1998) (stating that many courts have used batterer treatment as the primary response to domestic violence offenses), *available at* http://www.abtassociates.com/reports/ES-batterer.pdf.

236. It is important to note one significant difference between the SRVPP and the domestic violence units here. Unlike the DV program, which originated in a grassroots setting among police officers and local advocates, the SRVPP was conceived and implemented from the top down. State bureaucrats literally had to force it on prosecutors (or entice them into it with substantial grant money), because local officials perceived no tangible need for increased statutory rape efforts initially. *See* Interview with Prosecutor 1, Ruby County, *supra* note 35.

potential for making real changes over the long term. Unearthing these messages is the first step toward expanding our conception of the prosecutor's potential contribution to the world of social policy.

VII. BROADER IMPLICATIONS OF THE NEW PROSECUTION FOR THE POLITY

Up to this point, I have been considering the impact of the new prosecution's problem-oriented approach on the prosecutor's self image and job description. Now it is time to rotate the lens, to address the implications of the new prosecution for the targeted populations and for the community generally. In the previous section, I argued that we should adjust institutional prosecutorial norms, inspiring prosecutors to expand their conventional role to encompass crime reduction strategies that reflect and build upon preexisting criminal justice priorities and structures. Here, I address the consequences of adopting a much broader vision of problem-oriented prosecution, of turning prosecutors into social workers and prosecution into a tool of social engineering. This is the level of problem orientation that seems to animate California's SRVPP.

By appointing local prosecutors to solve social problems, we allow them to define the scope and meaning of appropriate relationships and responsible behavior. We also set the terms of the debate using criminal justice discourse: nonconforming or inappropriate activity becomes criminalized and subject to penal sanction and surveillance, while other types of responses (public health, education, and social service oriented responses) are dismissed as ineffective and soft. Criminalizing social problems means that what was once regarded as simply offensive behavior is recast as harmful,[237] forcing the offender to endure the punishment and stigma of the criminal process itself. In short, because a broad approach to problem-oriented prosecution leads policymakers to reconstitute social problems and available solutions according to criminal justice ideology, the new prosecution may become the source of more problems than it solves, particularly for vulnerable populations.

Consider the evidence from the SRVPP. By counseling victims and their families about appropriate teenage and parenting behavior, by conducting abstinence education sessions at local schools, and by tailoring probation terms to inspire defendants to be more "responsible," the SRVPP prosecutor has the ability to impose on various segments of the community his or her (typically white,

237. For a similar argument about the effects of order maintenance (broken windows) approaches to policing, see HARCOURT, *supra* note 52.

middle-class) values about responsibility and marriage.[238] These prosecution efforts often evolve into more general enforcement of the norms of "good" relationships, which typically means delaying sexual activity and encouraging long term monogamy.[239] This inclination is manifested most clearly by the Diamond County prosecutor who preaches premarital sexual abstinence generally,[240] and by the Standard County prosecutor who says that she requires defendants to attend all types of classes to "make sure the marriage will be okay."[241] The Garnet County prosecutor described his role in even more graphic (although tongue-in-cheek) terms:

> I'm the Sex Czar! . . . I think I am the final arbiter to some degree of the appropriateness of certain relationships! I certainly don't hold myself up as any more morally in-tune than anyone else and I don't pass judgment on a lot of these things except as it is required by my job. But I think my place in the system puts me ultimately at making a decision about whether this relationship should have the imprimatur of the law stamped on it.[242]

As the "Sex Czar," this prosecutor considers himself the "final arbiter . . . of the appropriateness of certain relationships." He decides whether a given relationship deserves legal sanction.

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238. Community-based or problem-oriented approaches to criminal justice generally assume that there is consensus in the community about the need to see problems solved, which in turn assumes that the community shares a definition of what constitutes order, threats to that order, and appropriate methods for maintaining it. *See* Mastrofski, *supra* note 52. All of these assumptions are problematic in communities characterized by heterogeneous populations. Furthermore, Mastrofski points to research showing how easily one might be deceived by the "appearance of a common heritage and shared tensions": even neighborhood residents in a small urban area defined by similar income levels and ethnicity can hold diverse views on matters such as "gang membership and disorderly activities, womanhood and sexual promiscuity, and obtaining an education or job." *Id.* at 49-50 (citing RUTH HOROWITZ, HONOR AND THE AMERICAN DREAM: CULTURE AND IDENTITY IN A CHICAGO COMMUNITY (1984)).

239. *See* CARL F. STYCHIN, GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM 35 (2003) (arguing that laws and legal actors seek to teach youth responsible sexual behavior, which inevitably means encouraging "a delay in embarking upon sexual activity . . . and leading to monogamous long-term relationships"); *see also* FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEX OFFENDING 38-39 (2004) (arguing that the goal of current adolescent sexuality policy is to prohibit interpersonal sexual activity completely).

240. Interview with Prosecutor 1, Diamond County, *supra* note 90.

241. Interview with Prosecutor 1, Standard County, *supra* note 110.

242. Interview with Prosecutor 1, Garnet County, *supra* note 159.

From where does this authority derive? Certainly the criminal law defines the parameters of physically abusive relationships with one's romantic partner, spouse, elderly parent, or child. But well below the border of physical abuse or criminal neglect in any relationship one might witness other troubling behaviors—inattentiveness, lack of concern, lack of commitment. These issues may present challenges in one's private life, but they are certainly not within the purview of the criminal justice system to fix. (To ignore one's lover may be unwise or unfeeling, but it is not criminal.) Yet many SRVPP prosecutors deem these instances of neglect or callousness to be relationship failures that can and should be addressed as part of case management and disposition. That is a lofty goal indeed, and we should question whether prosecutors are the proper authorities to be offering marital or relationship advice.[243]

If we look more broadly, this expansion of the prosecutor's jurisdiction into new, noncriminal areas of supervision and control stems from the assumptions inherent in the new prosecution's wide-ranging problem-oriented model. An intended corollary of transforming prosecutors into community problem-solvers is the criminalization of what were previously regarded as social problems. The criminal justice label is, after all, the source of the prosecutor's authority to handle the problem. But recasting social problems as criminal justice problems involves more than a simple rhetorical shift: it generates significant resource allocation but also significant consequences for those designated as the source of the problem.[244]

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243. Perhaps the prosecutor's authority in this area would be greater in a program that emanated from a grassroots campaign of concerned citizens, as was the case with domestic violence prosecutions and at least some of the jurisdictions that have adopted community policing and community courts. But here, because the SRVPP was conceived at the state level and imposed on localities from the top down, the prosecutor's ability to take on the role of social engineer in the local community is suspect. *See infra* note 236 and accompanying text.

244. Police scholar David Bayley has identified this same problem in the community policing context: by authorizing police to "advise, mediate, lecture, organize, participate, cooperate, communicate, reach out, solicit, and encourage as much in private places as public," community policing collapses the private and public domains that Western political theory has worked hard to separate. Bayley, *supra* note 214, at 231. He suggests that incorporating the police further into the community may improve public safety but comes at too great a cost to our freedom. *Id.*; *see also* MCELROY ET AL., *supra* note 2, at 187 (noting that "[s]ome commentators have expressed concern that extending the reach of the police further into the social and cultural life of the community may give the police more power than is desirable in a democratic society"). James Nolan has made a similar point with respect to community courts, arguing that they sacrifice due process and individual rights in pursuit of a therapeutic brand of justice. Nolan, *supra* note 68, at 1559; *see also* Anthony C. Thompson, *Courting*

As Emerson and Messinger argue, the nature of a "trouble" or personal problem is neither inherent nor static. While "the recognition that something is wrong" may be easily understood, what is to be done about that something is a matter up for discussion.[245] In the process of deciding how the trouble is best handled, society constructs the trouble itself; its identity and definition emerge as solutions are sought and institutions are called upon to devise a remedy. "[A]s steps are taken to remedy or manage that trouble, the trouble itself becomes progressively clarified and specified. In this sense the natural history of a trouble is intimately tied to—and produces—the effort to do something about it."[246]

While Emerson and Messinger's work concerned small or personal troubles, their analysis is equally applicable to large troubles like social problems.[247] Like individual difficulties, social problems can be (re)cast and (re)shaped according to the perspectives and discourse of the public agency charged with handling them. For example, the contested troubles at stake here—teenage pregnancy, adolescent sexuality, and welfare—had previously been considered social welfare problems, public health problems, and education problems. For decades, they had been addressed by a variety of social service agencies, discussed and evaluated according to social service priorities, and subjected to remedies that were generally rehabilitative, educational, or resource-oriented. Then, in the mid-1990s, the SRVPP recharacterized the nature of the difficulties facing the State of California; it reconstructed the trouble as a crime.

Affixing this new label was not merely the outcome of a debate about abstractions or placement in an organizational flow-chart. Criminalizing a social problem changes our understanding of the problem's essential elements, sources, and manifestations.[248] The Governor gave county prosecutors the resources and authority to

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Disorder: Some Thoughts on Community Courts, 10 WASH. U. J.L. & POL'Y 63 (2002). For a response to these criticisms about problem-oriented courts, see Greg Berman, *Redefining Criminal Courts: Problem-Solving & the Meaning of Justice*, 41 AM. CRIM. L. REV. 1313 (2004).

245. Robert M. Emerson & Sheldon L. Messinger, *The Micro-Politics of Trouble*, 25 SOC. PROBS. 121 (1977).

246. *Id.* at 123.

247. *See, e.g.*, MALCOLM SPECTOR & JOHN I. KITSUSE, CONSTRUCTING SOCIAL PROBLEMS (1987); Nachman Ben-Yehuda, *The Sociology of Moral Panics: Toward a New Synthesis*, 27 SOC. Q. 495 (1986).

248. For a thoughtful account of what it means to criminalize social problems from a political and pragmatic perspective, see STANLEY COHEN, AGAINST CRIMINOLOGY 257 (1988); Lisa Maher, *Criminalizing Pregnancy—The Downside to a Kinder, Gentler Nation?* 17 SOC. JUST. 111 (1992).

handle these problems because other institutions were perceived to have failed in their efforts, to have been stymied by approaches that were too "touchy-feely" or lacked teeth.[249] His administration deemed these pathologies criminal justice problems in order to subject them to criminal justice structures and sanctions, to increase their visibility, and to use the power of the criminal law to eradicate them. While these efforts may have been well intentioned, their implications are far from benign.

Invoking a criminal justice framework leads us to alter fundamental understandings about the nature and scope of the risk posed by particular behaviors. Criminalization redefines the troublemakers and their actions according to criminal justice ideology: irresponsibility becomes dangerousness; promiscuity becomes predation. The criminal label then produces secondary effects: policymakers and politicians may be inclined to ratchet up the rhetoric of danger in accordance with these new labels, which may heighten public concern (or cause a moral panic)[250] despite actual data documenting contradictory or ambiguous trends. Frank Zimring has observed that the tendency to adopt criminal or coercive interventions is particularly acute when the issue at stake concerns (real or perceived) threats to adolescent development.[251] Although the behavior itself remains the same, its ability to set off alarm bells in law and order policy circles, victims' groups, and community meetings increases dramatically once it is cloaked in the aura and language of crime.[252]

Moreover, the criminal justice system monopolizes the processes and remedies available to address the problem, so that only specifically punishment-oriented procedures and solutions—trials, monetary penalties, probation, incarceration, and surveillance—will be considered appropriate forms of redress.[253] While previous generations or administrations saw fit to help, treat, or educate

249. Interview with Prosecutor 1, Ruby County, *supra* note 35.

250. *See, e.g.*, ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE (1994).

251. Franklin E. Zimring, *The Jurisprudence of Teenage Pregnancy*, *in* EARLY PARENTHOOD AND COMING OF AGE IN THE 1990S 158 (Margaret K. Rosenheim & Mark F. Testa eds., 1992).

252. Jonathan Simon has argued that many modern states have a tendency to govern through crime, or through fear of crime, as a way to improve citizen responsiveness and submissiveness to government objectives. JONATHAN SIMON, GOVERNING THROUGH CRIME: THE WAR ON CRIME AND THE TRANSFORMATION OF AMERICA 1960-2000 (forthcoming 2006).

253. Of course punishment can take various forms, many of which are informal (such as gossip or ostracism). *See, e.g.*, TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 123 (1997). Here I focus exclusively on official punishment inflicted by the state.

people who faced or caused difficulty, a regime dominated by the criminal justice system insists that unleashing the power of the prosecutor's office and of the criminal court is the only effective way to manage problem populations and to reduce the incidence of problems in the future. In order for society to express clearly its condemnation of the problem and its commitment to a problem-free future, obvious deviants must be punished and potential deviants must be deterred through the threat of punishment;[254] alternative sanctions or treatment methods will not do. As my interviewees indicated in their comments about the disutility of diversion in statutory rape cases, law enforcement actors regard treatment alone as insufficient to get the job done; they believe that education will not in and of itself improve behavior or change minds. Where this skepticism towards rehabilitation informs the prosecutorial belief system, alternatives to punishment will be downplayed, criticized, and avoided. Once the criminal justice system becomes the dominant voice of social policy, it tends to colonize the field of remedies, squeezing out or discrediting approaches that do not contain punishment or surveillance at their core.

The mandatory collection of child support in the statutory rape context exemplifies the new faith in and enthusiasm for coercive interventions that seem to accompany the criminal label.[255] Many victims in the statutory rape caseload are pregnant with (or are already parenting) the defendant's child. Given this state of affairs, many prosecutors see it as their job to ensure that the defendant takes emotional and financial responsibility for his child. Recall that the Franks County prosecutor mentions his use of both "the carrot and the stick" to foster a responsible family unit;[256] the Ruby County prosecutor reveals that she uses probation as a tool to nudge the defendant toward financial responsibility.[257] Why is this necessary? Prior to the SRVPP, the family courts in California imposed child support requirements on out-of-home parents, and the

254. Punishment works to degrade and to express community disgust with the offenders; alternative sanctions that do not serve these functions are less appealing to the populace. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591 (1996). The need to express community disgust, to restore the validity of violated norms, and to ensure against future violations seems to be particularly acute in crimes with symbolic significance, those that have a social meaning that extends beyond the preferences or consent of the actors involved in the behavior. TYLER ET AL., *supra* note 253, at 121.

255. Zimring, *supra* note 251.

256. Interview with Prosecutor 1, Franks County, *supra* note 114.

257. Interview with Prosecutor 2, Ruby County, *supra* note 125.

Penal Code already criminalized failure to pay child support.[258] Nonetheless, statutory rape prosecutors, in accordance with the grand SRVPP design dictated in Sacramento, incorporated child support into their case-management portfolios in order to increase the odds of collection and to signal that these preexisting mechanisms were ineffective. By tying child support arrangements into criminal probation for a sex offense, the prosecutor implicitly threatens the statutory rape defendant with criminal justice sanctions for noncompliance. The risk of incarceration is considered to be a powerful incentive to get these wayward parents to buy diapers and formula, as the power to deter deviant or irresponsible reproductive behavior was the reason prosecutors were given the SRVPP in the first place.[259]

Aside from the physical or monetary punishments imposed by the courts, troublemakers who become associated with the criminal justice system must endure the process of being a criminal defendant, which has been aptly described as punishment in and of itself.[260] The defendant in a criminal court may face pretrial detention,[261] long delays without justification, information black holes, and the disrespect of the court staff or police personnel. Often he must miss multiple days of work to attend court hearings that never materialize, although he himself will be punished if he fails to appear at a single event. In short, "criminal investigation and adjudication [can work] a wrenching disruption of everyday life" for those forced into it.[262] Prosecutors often recognize the punishing effects of the criminal process on defendants, although they tend to be far from sympathetic; one observer has noted that following an acquittal, "prosecutors sometimes console themselves with a

258. CAL. PENAL CODE § 270 (Deering 2005).

259. *See supra* Part I. The 1996 PRWORA likewise sought to make fathers, not taxpayers, bear responsibility for children. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. Also, the impacts of this approach are not limited to impositions on the defendant's life. Recall that Lisle County *requires* not only the defendant but also the victim to submit to a blood test when she is pregnant. According to the terms of the policy, it seems the victim is required to submit to the blood test even if she does not in fact wish to claim child support from the defendant. Interview with Lisle County prosecutor, *supra* note 92.

260. FEELEY, *supra* note 184.

261. *See, e.g.*, ROY B. FLEMMING, PUNISHMENT BEFORE TRIAL: AN ORGANIZATIONAL PERSPECTIVE OF FELONY BAIL PROCESSES (1982) (arguing that pretrial detention amounts to an infliction of punishment on the accused before she is found guilty of any crime).

262. Young v. United States *ex rel.* Vuitton et Fils, 481 U.S. 787, 814 (1987).

sentiment such as, 'Well, at least I dragged the defendant through trial and made him pay legal fees.'"[263]

In addition to the hardships imposed by the costs and delays of the process, the accused is likely to suffer the long and short term effects of stigma resulting from his involvement in a criminal case. Criminal convictions, unlike other "remedies" to social problems, can affect one's reputation, citizenship status, voting rights, jury eligibility, employability, and self-esteem long after the case has ended. The stigmatic effects can attach even after an acquittal or dismissal of charges; persons accused of crimes (particularly those crimes involving moral turpitude) report that the mere fact of accusation can diminish one's aspirations, reputation, job prospects, and community standing.[264] Because they can subject individuals to "embarrassment, expense and ordeal,"[265] even prosecutions of relatively low-level crimes that result in little or no amount of incarceration have the capacity to radically transform the defendant's life.

Lastly, the consequences of locating social problems in the criminal justice system are not just borne by the defendants; the crime model implicitly and explicitly recasts the sexually active teenager as the victim of a crime. Although formal law declares that society is the victim in any criminal prosecution, the individual directly harmed has a central role in the criminal case. Consequently, many of the prosecutors with whom I spoke described their strategies for convincing seemingly independent teenagers of their true victim status. Constructing the victim in this fashion serves a number of purposes from the prosecution perspective. It makes the teenager more pliable and more responsive to the prosecutor's efforts to convict and punish the offender; the teen learns to see the prosecutor as her advocate rather than her enemy. Furthermore, a teen who understands how she was victimized appears more vulnerable and more credible in the courtroom; a

263. Bresler, *supra* note 176, at 539. The author mentions that when prosecutors say, "You can beat the rap, but you still can't win," they are acknowledging the damaging effects of being accused of a crime regardless of the trial's outcome. He also notes that police have been known to say, "[Y]ou can beat the rap, but not the ride," meaning that a defendant might win in the courthouse but still must suffer in the stationhouse. *Id.*

264. *See, e.g.*, Bresler, *supra* note 176, at 537-38 (documenting the outcome of the federal bribery trial of John Connally, the former Governor of Texas and Secretary of the Treasury of the United States; although he was acquitted, Connally lost his "serenity and reputation, . . . $400,000 in legal fees . . . and, Connally believed, the presidency").

265. Green v. United States, 355 U.S. 184, 187 (1957).

judge and jury will be more likely to see her as a victim if she perceives herself that way. Finally, prosecutors hold a more optimistic outlook for those parents and teens who comprehend and internalize the victim story, compared to their expectations for resistant families. A teen who understands how she was exploited in the past is less likely to be captivated by smoke and mirrors in the future, while parents who see their child as a victim rather than a troublemaker will be more sympathetic and more careful.

While it is surely the case that most prosecutors who engage in this type of victim work have solid intentions and respectable motivations, the process of constructing the victim has a dark side as well. Transforming a sexually active teenager into a victim of crime robs her of her sexual agency and limits her decision-making authority.[266] It reminds her that she is, in the eyes of the law, powerless to control her sexual autonomy or to make even rudimentary choices in the area of romance, a message that may hinder rather than smooth her path to adulthood. As one scholar has noted, "our sense of being the author of our own actions, especially when they pertain to something as personal as [sex and] reproduction, is profoundly valuable to us. We cannot believe that all of our preferences are irredeemably 'not ours' without our sense of self effectively collapsing."[267] Certainly there is some debate about whether the autonomy paradigm is appropriate in the case of teenagers.[268] I raise the point here simply to underscore that by

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266. Note that we are, in fact, talking about fourteen to seventeen year-olds here, rather than young children. *See supra* note 31. Each year roughly eighty-five percent of SRVPP victims fall within this range, and approximately one-third are sixteen or seventeen. *See* Levine, *supra* note 5, at 183. Many other states recognize that older teens have the capacity to make their own choices about sex; seventy percent of states have set the age of consent at sixteen or lower. *See* SHARON G. ELSTEIN & NOY DAVIS, SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES (1997); ZIMRING, *supra* note 239, at 18-19. Kristin Bumiller has observed a similar dark side to victim designation in the employment discrimination context; she argues that many individuals who experience discrimination strongly resist being called victims because they cannot tolerate the lack of autonomy and sense of powerlessness that accompany this label. KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988).

267. EMILY JACKSON, REGULATING REPRODUCTION: LAW, TECHNOLOGY AND AUTONOMY 7 (2001).

268. On the issue of sexual autonomy, see, e.g., LYNN M. PHILLIPS, UNEQUAL PARTNERS: EXPLORING POWER AND CONSENT IN ADULT-TEEN RELATIONSHIPS, PLANNED PARENTHOOD OF GREATER NORTHERN NEW JERSEY (1997) (on file with the author); Terry Leahy, *Sex and the Age of Consent: The Ethical Issues*, 39 SOC. ANALYSIS 27 (1996); Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15-78

automatically characterizing the teen as a victim, the criminal justice framework preempts any further discussion about sexual autonomy or the meaning of consent.

The new prosecution, then, has the potential both to expand and to fundamentally reorient the institution of prosecution in the United States. Yet, when the problem-oriented model adopts far-reaching objectives, when we allocate to the prosecutor the responsibility for fixing social pathologies, we may unwisely limit the range of options and resources available to address these concerns. By allowing the criminal justice system to dominate our ideology and discourse about social problems, we construct "victims" and "defendants" from more ambiguous templates and permanently affix the stain of the criminal justice system to a sizable segment of our vulnerable populations.

VIII. CONCLUSION

In an age where funding for social services is constantly on the decline and law and order programs seem to be the only measures garnering bipartisan support, criminal justice agencies may be the only institutions with the financial resources to take on seemingly intractable social problems. Inspiring these agencies and their employees to adopt more holistic approaches to criminal justice should produce more well-rounded and sympathetic criminal justice actors, people who take seriously their ethical commitments and who develop the skills necessary to reach the communities they serve. Certainly there is ample room for prosecutors to be both professional and connected in their pursuit of substantive justice, and, to the extent that the new prosecution's community-based, crime reduction techniques support this approach, they are a welcome innovation.

But extending the prosecutor's empire by implementing programs that turn social pathologies into criminal justice problems may impose costs that are too extreme for us to bear. Giving prosecutors the authority to define and to manage a range of community sexual and financial troubles simply because other

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(1994); Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703 (2000); Lynn M. Phillips, *Recasting Consent: Agency and Victimization in Adult-Teen Relationships*, *in* NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT 82-107 (Sharon Lamb ed., 1999). As to the ability of teenagers to make autonomous decisions more generally, see Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 371 (Thomas Grisso & Robert G. Schwartz eds., 2000).

institutions (are perceived to) have failed reflects short term, crisis-oriented thinking rather than an in-depth understanding of the problems that lie at the core of adolescent sexual behavior, poverty, and early childbearing. It also ignores the constraints imposed by prosecutors' current educational training and workplace norms, both of which promote adversariness at the expense of long term policy planning. As has been argued in the context of court reform, a "quick-fix approach" that neglects the needs and concerns of both consumers and workers in the criminal justice arena is destined to provide the drama but not the substance of real reform.[269]

If we look more broadly, the new prosecution brings sharply into focus the inherent tension between the prosecutorial role and the robust maintenance of constitutional rights and norms. The new prosecution—in turning the prosecutor into legislator, investigator, judge, jury, and executive (not to mention social worker and politician)—does away with our traditional safeguard of individual rights: the separation of powers. According to this new approach, prosecutors can and should be trusted to fulfill all of these functions themselves; we need no outside or independent decision-maker to review or check prosecutorial choices. While some have argued that criminal justice actors can (and should be allowed to) assist minority actors and communities through their selective enforcement of the laws,[270] the new prosecution model exposes the flaws in this progressive understanding of discretion. It suggests that prosecutors' individual ideas (and the ideas of those staffing the governor's office) about appropriate behavior should control the law in action and determine how, when, and against whom laws get enforced. This precise set of conditions and arguments gave rise to our separation of powers jurisprudence in the first place, as this degree of discretion threatens to allow the prosecutor to impose her will on the populace at large, and on minority communities in particular. In a world where most prosecutors resemble the populations they prosecute, perhaps this risk would be insignificant. But that is not the status quo.

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269. FEELEY, *supra* note 61.

270. *See generally* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197 (1998); Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245 (1998); Brief of Chicago Neighborhood Organizations as Amicus Curiae in Support of Petitioner, Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121). For a powerful critique of the Kahan-Meares approach, see Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215 (1998).

Moreover, the affinity between the new prosecution and social problem type crimes (like statutory rape) may erode individual rights in other, more subtle ways. Social problems do not just exist in a vacuum or spring from the air; they emerge through the actions or omissions of certain people or institutions. Policymakers charged with identifying, addressing, or solving social problems thus have difficulty tackling the problem without simultaneously implicating (or sometimes trampling) the privacy and autonomy rights of the problematic actors. Consequently, state-imposed "cures" for drug addiction, poverty, welfare reliance, or teen pregnancy often impose unwieldy burdens on the very populations they are meant to assist. These burdens can become intolerable where the social problem stems from or involves sexual behavior and the cure is administered by the criminal justice system. In other words, our notion of privacy rights suggests that the state must observe limits when it meddles in people's sex lives and partner choices, yet the new prosecution dilutes or ignores those limits by giving prosecutors the authority to invade privacy in the name of social engineering.

This move might be explained in light of other trends in sexuality regulation more generally. On the one hand, courts and legislatures in recent years have dismantled criminal laws against consensual sodomy, fornication, and adultery, acknowledging that the state has no business using the criminal law to control private sexual behavior. Yet formal legal actors have taken great pains to accelerate their regulation of adolescent sexuality, as evidenced by changes to abortion laws and sex education programs. Statutory rape enforcement programs, such as that embedded in the SRVPP's new prosecution model, may be just another example of lawmakers' tendency to distinguish the sexual rights of minors from those of adults as a way to justify increased intervention and control. When we cannot use the law to make teens abstain from having sex, we rely on legal strategies to impose negative consequences for choices adults deem unwise.[271] Ironically, adults would never tolerate limits

271. The opposing paradigms described by George Lakoff come to mind here. Lakoff describes two worldviews of the state's role in regulating the lives of individuals: the Nurturant Parent model and the Strict Father model. Those who espouse the Nurturant Parent view believe the state should encourage responsibility and empathy, which in the case of teen sexuality means that teens should be given sufficient information to make responsible sexual choices and that prevention of disease should be our primary goal. Those who subscribe to the Strict Father view value obedience and discipline, which suggests that children should be punished for making the wrong choices, such as engaging in premarital sex. GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE 46-51 (2004); *see also* Lisa Littman, *A Roadmap*

on these types of choices in their own lives.

In sum, the new prosecution represents a paradigm shift in the way prosecutors do their jobs and relate to the community. Although this model builds on decades of increasing prosecutorial power in the criminal courts and recent moves to make criminal justice actors more responsive to community concerns, the revolution it requires has generated significant opposition both from within prosecutors' offices and in the larger community. Whether it takes hold and gathers momentum remains to be seen, but I sense that the new prosecution may prove to be more of a problem than a solution for both prosecutors and the rest of society.

to Defining and Winning the Real Abortion Debate: Prevention vs. Punishment, at http://www.longviewinstitute.org/projects/reprod/littmanabortion (last visited Nov. 7, 2005).